ARTICLES

A DUAL-ROLE BILINGUAL MEDIATOR IS INEFFICIENT AND UNETHICAL

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I. INTRODUCTION

The stereotypical image of an attorney has changed in recent years. No longer is litigation the primary practice for a majority of lawyers. The grandiose image of two well-dressed attorneys, advocating for their respective clients in a lavish courtroom with a black-robed judge and a panel of jurors is no more. In fact, many attorneys have switched gears and moved on to transactional and other fields of law—fields that require less litigation to resolve disputes. Many law firms have hired more transactional attorneys to handle the bulk of their business, while maintaining a smaller litigation department for the actual disputes that must go to trial. Even then, most cases are now settling outside of the courtroom, thanks to the development of Alternative Dispute Resolution (ADR).[1]

In fact, because of the advancement of ADR, many attorneys are subject not only to participating in their representative capacities while settling cases during ADR proceedings, but many are also electing to become ADR practitioners. ADR practitioners not only specialize in

1. *See* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 166–67 (2003) (detailing the history of ADR and its development and incorporation into the legal system); Patrick E. Higginbotham, Essay, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405 (2002) (giving a detailed analysis regarding the steady decline of tried cases yet the increased number of filings). Judge Higginbotham concluded that the advent of ADR has increased the amount of filings in the federal courts, but has likely been done in response to avoid the costly litigation expenses. Patrick E. Higginbotham, Essay, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1415–18 (2002).

representing parties during negotiations, mediations, arbitrations, and the other ADR proceedings,[2] but also in becoming arbitrators, mediators,[3] and private judges.[4] Some of these practitioners are actually setting up their own firms, focusing solely on the practice of ADR. Either as a part of a "traditional" firm, ADR firm, or in solo practice, ADR practitioners provide these third-party neutral services as a part of their everyday legal practice.

The mediator, as a third-party neutral, is an impartial person who makes the mediation process work. There is no explicit qualification or requirement in Texas that a mediator be licensed.[5] In fact, the only explicit requirement for a mediator in Texas is in the context of court-annexed mediation where a forty-hour training course from a recognized ADR system or organization is necessary, but not a law degree.[6] The sole focus of this Article is to analyze the licensed attorneys who are engaging in these ADR practices,[7] namely those providing mediator services. The term "mediator," for the purposes of this Article, is interchangeable with an attorney-mediator serving as a neutral third party.

Attorneys providing mediation services are in the legal business to make a profit. These attorney-mediators market themselves aggressively, based on their individual skill sets.[8] Perhaps one of the greatest practical skills any attorney can have is to be bilingual. This skill allows the attorney to communicate with a broader array of clients, especially those who have trouble overcoming the English language barrier between themselves and the American society along with its corresponding legal system.

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2. TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.021 (West Supp. 2010), §§ 154.022–.027 (West 2005) (outlining the different ADR proceedings recognized in Texas under the Texas Alternative Dispute Resolution Act).

3. *See* Ann L. Milne et al., *The Evolution of Divorce and Family Mediation: An Overview*, *in* DIVORCE AND FAMILY MEDIATION 3, 9, 12 (Jay Folberg et al. eds., 2004).

4. *See id.* at 21–22.

5. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.052(a) (West 2005); *see also* L. Wayne Scott, *The Law of Mediation in Texas*, 37 ST. MARY'S L.J. 325, 338–39 (2006) (detailing the qualification requirements of a mediator). The problem with non-lawyer mediators serving as the third-party neutral is whether they are engaging in the unauthorized practice of law. L. Wayne Scott, *The Law of Mediation in Texas*, 37 ST. MARY'S L.J. 325, 338–39 (2006). It is important to note that there is an inherent tension with lawyers serving as mediators, mainly being subject to the ethical constraints of the legal profession. *Id.*

6. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.052(a) (West 2005).

7. *See* MODEL RULES OF PROF'L CONDUCT R. 2.4 cmt. 2 (2009).

8. Joseph P. McMahon, *Moving Mediation Back Towards Its Historic Roots—Suggested Changes*, 37-JUN COLO. LAW. 23, 24–26 (2008) (describing the indicators of ADR commoditization and its effects of commoditized mediation).

There are two ways to communicate utilizing language: the written word and the spoken word. Before proceeding, it is important to note the distinction between "interpretation" and "translation."[9] The terms are consistently used interchangeably outside of inter-language fields of study, but they in fact carry very different meanings, techniques, and approaches. Interpretation is the "unrehearsed transmitting of a spoken or signed message from one language to another," while translation is "converting a written text from one language into written text in another language."[10] Therefore, when facing two different languages, interpretation assumes the intermediary role for the spoken word, and translation does the same for the written word. Translation, although a similarly critical aspect of language communication, is outside of the scope of this Article.

Prior to the Court Interpreters Act of 1978, the only manner of obtaining adequate representation to circumvent the language barrier was to hire a bilingual attorney, aside from relying upon privately paid interpreters with uncertain credentials.[11] This still holds true today, especially with the vast expenses incurred in modern litigation. Non-English-speaking litigants can save money by hiring a bilingual attorney to explain the legal ramifications of their cases and rights in their native language. The same practice holds true in hiring attorney-mediators. The mediator's job is to facilitate communication between two parties in hopes of achieving a settlement, and an interpreter's goal is to facilitate communication between the two parties in two different languages.

But what would happen if a bilingual attorney marketed herself to serve both the roles of an interpreter and a mediator in a dual capacity? The bilingual attorney-mediator will profit, essentially killing two birds with one stone. The bilingual mediator's responsibility would entail two distinct, dual roles: one as the mediator and the other as an interpreter. At first glance, it seems each role can be loosely superimposed upon one another. Both the interpreter and mediator roles provide assistance in facilitating communication—one for language and one for disputes between adversarial parties. The dispute in a case requiring a bilingual me-

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9. Angela McCaffrey, *Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters*, 6 CLINICAL L. REV. 347, 349–50 (2000) (differentiating between interpretation and translation, commonly misconstrued terms).

10. *Id.* at 349–50 nn.3–4.

11. Bill Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M. L. REV. 1, 4 n.25 (1990) (mentioning state legislative and constitutional provisions for interpreters). This includes other related state legislation and case law that provides interpreters for non-English speaking individuals. The various states have different legislation and provisions, but mainly the protection is for testifying witnesses as well as criminal defendants. Generally the protection is not advanced for civil litigants, although there are some states arguably providing for interpreters statutorily. *See* TEX. GOV'T CODE ANN. §§ 57.001–.002 (West 2005).

diator is in two languages, making the responsibility increase two-fold: facilitating communication between adversarial parties and interpreting that communication for the benefit of the client.

There are a several ethical issues that arise when serving as both the interpreter and mediator, especially in the context of neutrality and confidentiality. Those ethical issues are the focus of this Article. The main discussion will revolve around the ethical duties and rules each role has when a bilingual mediator serves as both a mediator and an interpreter. The role of the attorney-mediator is controlled by relevant state rules of conduct, promulgated by state supreme courts, which typically reflect the language of the American Bar Association's (ABA) Model Rules of Professional Conduct (MPRC).[12] The interpreter's role is controlled by various organizations that promulgate their own codes of interpreter ethics for different settings, as well as state and federal licensing boards, and general ethical standards well-known in the field.[13]

Part II of this Article gives a brief overview regarding ADR and mediation (focusing on Texas law), interpretation, language and communication, a brief history concerning the constitutional right to an interpreter in criminal proceedings and the statutory right in civil proceedings, and a discussion of the evolving field of family law mediation. The ethics of two distinct roles—an attorney-mediator and an interpreter—and their corresponding authorities will be discussed in Part III. Part IV provides a thorough analysis of the inherent issues with the dual-role: the ethical issues, its inefficiency, and "interpreter fatigue," to demonstrate why a mediation session with a dual-role mediator should not be done. Finally, Part V concludes with a solution as to what should be done in the context of mediation with parties speaking different languages and which individuals must be present and in what capacity. Additionally, changes the legislature can make to protect non-English-speaking litigants by expanding the statutes and regulations to expressly prohibit dual-roles in mediation will be discussed, as well as potentially using a co-mediator model as an alterative.

12. MODEL RULES OF PROF'L CONDUCT pmbl. 3, 20, R. 1.12, R. 2.4 (2009).

13. These organizations include: the Federal Court Interpreter Program, Registry of Interpreters for the Deaf, American Disabilities Act Mediation Guidelines, the National Council on Interpreting in Health Care, National Association of Judiciary Interpreters and Translators, etc.

II. BACKGROUND INFORMATION

A. *History of Alternative Dispute Resolution*

Modern ADR arose from the "community justice movement" in the 1960s and 1970s.[14] Members of the community justice movement felt formal legal institutions imposed strict rules that overburdened and controlled them—this grassroots initiative sought to take the power back from the elite.[15] Small groups set up "[c]ommunity justice centers [ ] funded variously by the federal and local governments and national and local foundations that were seeking remedies for social violence."[16] The local courts began to take notice and started sending minor disputes to the local community centers for resolution.[17]

The community justice movement was not alone in implementing ADR within its ranks; the court system had its own ADR movement, as well.[18] Courts and the new "court management" revolution were the initial motivation for attempting to settle disputes outside of the courtroom litigation.[19] The inspiration behind ADR in the court system was various speeches delivered at the 1976 Roscoe Pound Conference, where high-ranking members of the judiciary and scholars gathered to discuss their dissatisfaction with the court system.[20] The keynote address was delivered by Chief Justice Burger, in which he called for court reform in preparation of the fast-approaching year 2000.[21] Harvard Professor Frank

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14. Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 170 (2003).

15. *Id.*

16. *Id.*

17. *Id.* at 172 (discussing local courts' attempt to alleviate their workload through referrals to local community centers).

18. *See id.* at 174–75 (explaining that people wanted "a more business-like approach to utilizing public resources, including judge time").

19. Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 174 (2003).

20. *See* JEROME T. BARRETT WITH JOSEPH P. BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL, AND SOCIAL MOVEMENT 182–83 (2004) (stating that more organizations started to encourage ADR in the 1970s after its demonstrated use in labor disputes and civil rights). Members of the legal community explored Rule 16 of the Federal Rules of Civil Procedure, which seeks to expedite the resolution of a case. *Id.* at 182. Specifically, judges would introduce the option of ADR in the pretrial conference. *Id.* Studies have shown that the vast majority of lawsuits come to a resolution before a court's decision. *Id.*; *see also* Hon. Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation, in* 70 F.R.D. 79, 83–95 (1976) (remarking on the possibilities of improvement, reform, and alternatives to the court system).

21. Hon. Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation, in* 70 F.R.D. 79, 83–95 (1976) (emphasizing the importance of the conference due to the gathering of high-ranking leaders in the legal community coming together to analyze the justice system).

Sanford "argued against a 'one-size-fits-all' justice system, and in favor of courts that would provide a variety of dispute resolution techniques to citizens."[22] Professor Sanders' address to the conference "became the impetus for a movement to create what he later called a 'multi-door courthouse,' that would offer disputants different forms of dispute resolution from which to choose."[23] Judicial non-binding arbitration and settlement conferences were the courts' first attempt at ADR, leading to the coining of the term "alternative dispute resolution."[24]

By the late 1980s, ADR was the wave of the future. Texas jumped on the ADR bandwagon, passing the Texas ADR Act in 1987.[25] The Act was codified in Chapter 154 of the Texas Civil Practice and Remedies Code and "served to jump-start the use of [ADR] in Texas."[26] The goal established by the legislature was "to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures."[27]

B. *Mediation*

Mediation is perhaps the most popular modern ADR procedure.[28] Mediation is defined by the Texas ADR Act as "a forum in which an impartial person . . . facilitates communication between parties to promote reconciliation, settlement, or understanding among them."[29] "The mediator's job is to assist in the resolution of conflict, and so it is important that she have an understanding of the many forms and functions of conflict."[30] It is important to note that the mediator is not allowed to adjudge the issues between the parties, but is only allowed to facilitate a voluntary settlement between the disputing parties.[31] As applied today,

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22. Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 174–75 (2003).

23. *Id.* at 175.

24. *See id.* at 175–79 (2003).

25. Act of June 20, 1987, 70th Leg., R.S., ch. 1121, § 1, 1987 Tex. Sess. Law Serv. 1121 (West) (current version at TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.001–.073 (West 2005)).

26. L. Wayne Scott, *The Law of Mediation in Texas*, 37 ST. MARY'S L.J. 325, 327 (2006); *accord* TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.001–.073 (West 2005).

27. TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (West 2005).

28. *See* Hon. Thomas J. Moyer, Essay, *ADR as an Alternative to Our Culture of Confrontation*, 43 CLEV. ST. L. REV. 13, 15 (1995).

29. TEX. CIV. PRAC. & REM. CODE ANN. § 154.023(a) (West 2005).

30. KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 2 (3rd ed. 2004) (footnotes omitted).

31. TEX. CIV. PRAC. & REM. CODE ANN. § 154.023(a)-(b) (West 2005).

the Texas ADR statutes allow a court, "on its own motion or the motion of a party, [to] refer a pending dispute for resolution by an alternative dispute resolution procedure."[32] One of those ADR procedures is "a nonjudicial and informally conducted forum for the voluntary settlement of citizens' disputes through the intervention of an impartial third party"—another description for mediation.[33]

There are several theories concerning a mediator's role in a mediation.[34] On one end of the spectrum, there is pure facilitative mediation, where the mediator "assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do."[35] On the other side is evaluative mediation, where the mediator "intend[s] to direct some or all of the outcomes of the mediation."[36] The evaluative mediator "assumes that the participants want and need her to provide some guidance as to the appropriate grounds for settlement . . . [, and] is qualified to give such guidance by virtue of her training, experience, and objectivity."[37] There is a debate between the actual mediation styles used by most attorneys; although the statute says the mediator should be facilitative, "evaluative mediation seems to predominate as the method used by most mediators in Texas."[38] Accord-

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32. *Id.* § 154.021.

33. *Id.* § 154.021(a)(3).

34. *See generally* Leonard L. Riskin, *Replacing the Mediator Orientation Grids, Again: Proposing a 'New New Grid System,'* 23 ALTERNATIVES TO HIGH COST LITIG. 127 (2005) (revisiting and altering his own well-established conception of mediation approaches). Professor Riskin initially popularized facilitative and evaluative mediation as the two primary schools of thought on mediation, but has since expanded to include three other types of decision making: substantive, procedural, and meta-procedural. *Id.* at 128. Recently, he has also attempted to re-coin evaluative mediation as directive mediation and facilitative mediation with elicitive, but his old terms have remained in ADR academia. *Id.* at 127; *see also* Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003) (discussing his previously established mediation approaches or "grids" and proposing updated versions); Leonard L. Riskin, *Retiring and Replacing the Grid of Mediator Orientations*, 21 ALTERNATIVES TO HIGH COST LITIG. 69 (2003) (assessing issues in earlier mediation system presented in 1994 and 1996 articles); Leonard L. Riskin, *Understanding Mediators' Orientation, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 44–45 (1996) (summarizing two main approaches for a mediator role).

35. Leonard L. Riskin, *Understanding Mediators' Orientation, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 24 (1996) (clarifying the main differences between an evaluative approach that utilizes directing behaviors and a facilitative approach which focuses on communication or understanding).

36. *Id.* at 23–24.

37. *Id.* at 24.

38. L. Wayne Scott, *The Law of Mediation in Texas*, 37 ST. MARY'S L.J. 325, 343 (2006). Professor Scott's analysis of mediation in Texas is a very thorough summary of the current legal status of the practice as well as a broad overview for any individual involved

ing to the statute, the mediator should facilitate communication, but communication is not always just in English.

C. *Different Languages Complicate Communication*

Arguably, at the heart of the entire field of ADR is communication.[39] "[ADR] is a communication process, . . . the solving of legal problems is a mere byproduct."[40] The method of communication between the parties can impact how they view the conflict and its corresponding dispute between them.[41] Communication is essential to settling a dispute, especially in mediation where the parties are trying to "talk out" their issues.[42] Inherent in mediation are certain complex communication problems "such as information sharing, trust, empowerment, problem solving, active listening, [and] reframing."[43]

Language allows the individual to order experience and structure reality, influencing his perception and thought process.[44] "As a meaningful system of symbols, culture thus fulfills a number of societal functions, one of the most important being communication . . . . [It] is not only a way to interact with others but also a necessary means to transmit culture, to disseminate and refine it."[45] Communication is a major part of the medi-

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in a mediation process. It is highly recommended reading for any practitioner planning to engage or participate in mediation in Texas.

39. *See* KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 3 (3rd ed. 2004) (explaining the theory behind disputes and conflict, where communication is "an integral part of conflict"). "The exchange of both verbal and nonverbal messages is the most significant part of disputing." *Id.*

40. *Id.* at 51–52.

41. *See id.* at 3 (emphasizing the significance of communication in resolving disputes).

42. *See id.* at 51 (retelling that the consensus in the field is that "one of the most important skills for a [successful] mediator is the ability to communicate"). The mediator must be able to successfully communicate with the individual parties, but also to facilitate communication between the mediation parties. *Id.*

43. Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295, 327 (2006) (internal quotations omitted). For a more thorough meditation-focused analysis of the complex issues found in communication, both verbal and nonverbal, see KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 52–58 (3rd ed. 2004).

44. Guy Olivier Faure & Gunnar Sjöstedt, *Culture and Negotiation: An Introduction*, *in* CULTURE AND NEGOTIATION 1, 4 (Guy Olivier Faure & Jeffery Z. Rubin eds., 1993) (discussing the importance of language in culture, which affects all forms of ADR via communication, not only negotiation). Events are interpreted "through a unique set of categories" which may be significantly different from one society and language to the next. *Id.* For example, the Aztecs grouped ice, snow, and frost together broadly in one word, while the Eskimo, on the other hand, differentiate snow more than twenty ways. *Id.*

45. *Id.*; *see also* JAY FOLBERG & DWIGHT GOLANN, LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW 23 (2006) (discussing the implications of culture on negotiation). For an in-depth discussion on the effects of cultural and racial variation in negotiation, see JAY

ation process and language is the form of communication between the parties; therefore, if the two parties do not share a similar native language, the interference is amplified.[46] The addition of a language barrier, as well as taking into account the intricate cultural barrier accompanying language,[47] would only multiply the already complex communication issues found in mediation.[48]

FOLBERG & DWIGHT GOLANN, LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW 237–53 (2006).

46. Christophe Dupont, *Switzerland, France, Germany, the Netherlands: The Rhine*, *in* CULTURE AND NEGOTIATION 97, 109 (Guy Olivier Faure & Jeffery Z. Rubin eds., 1993).

47. "Language should be considered a mirror of its culture. It reflects the culture's content and nature. Not only, however, is language a product of culture, but culture is a product of language, as well." TRACY NOVINGER, INTERCULTURAL COMMUNICATION: A PRACTICAL GUIDE 45 (2001) (footnote omitted). "Viewed as an obstacle in intercultural communication, the problem of not knowing the language (the code) is self-evident." *Id.* at 48. Individuals tend to avoid communication with other persons who do not speak the same language. *Id.* at 49. "It is uncomfortable and embarrassing not to understand what a person is saying or not to have them understand you. The majority of people in a host country, for example, prefer to communicate with a foreign person who speaks the host country's language well." *Id.*

48. Failure to reach an agreement due to misunderstandings is exactly what happens when mediating in two languages. In fact, the professional culture of lawyers worldwide shares a "common language," which may facilitate the discussion of legal issues, but it does not eliminate cultural barriers inherent in the larger problem at issue in the ADR situation. *See* KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 505 (3rd ed. 2004) (elaborating on the issues with cross-cultural mediation, "the mediation between individuals from different cultures"). Disputing parties typically fail to reach an agreement "because of a lack of mutual understanding." *Id.*; Winfried Lang, *A Professional's View*, *in* CULTURE AND NEGOTIATION 38, 45–46 (Guy Olivier Faure & Jeffery Z. Rubin eds., 1993) (illustrating the relative ease of multilateral negotiations between national delegations, where the presence of an international organization fills a role similar to a mediator, with the potentially conflicting bilateral negotiations, where only two nations meet in a sometimes confrontational setting); *see also, e.g.*, Julie Barker, *International Mediation—A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans*, 19 LOY. L.A. INT'L & COMP. L. REV. 1, 18–20, 27–28 (1996) (explaining cross-cultural conflicts in international commercial mediation and the language barrier); Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 4–7 (1997) (discussing mediation services for non-English speakers and furthering the need for interpreters in mediation); Abraham Kuhl, Comment, *Family Law Online: The Impact of the Internet*, 21 J. AM. ACAD. MATRIM. LAW. 225, 239 (2008) (applying the difficulties found in communication to a mediation conducted via Internet, which may impair the mediation). While mediation via Internet can offer several benefits such as cost reduction, speed and efficiency, and ease of scheduling, some worry that a mediation done solely through textual communication will risk misunderstandings. Abraham Kuhl, Comment, *Family Law Online: The Impact of the Internet*, 21 J. AM. ACAD. MATRIM. LAW. 225, 239 (2008). Such misunderstanding could be due to the lack of non-verbal communication or expression when one is trying to convey a point. *Id.*

The United States does not have an official national language, although some individuals feel there should be one, and still others oppose such a notion.[49] The majority of "everyday" life in the United States is conducted in various languages, easily evident from media programming, bilingual education, and more.[50] There is a variation amongst the individual states in terms of an "official" language; twenty-nine states arguably having "grant[ed] English some form of official status."[51] The state of Texas has not done so.[52] Texas's population is extremely diverse, with a variety of different cultural and ethnic demographics, and more importantly, several different languages.[53] According to the 2008 American Community Survey, 7.5 million Texans, or 33.8% of the population, speak a language other than English at home.[54] Spanish is the second most spoken language in Texas at 29% of the entire population over the age of five.[55] It should come as no surprise then that disputes involving a non-English speaker are likely to occur, effectively bringing the dispute into the bilingual mediator's target market.[56]

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49. *See* Tamar Brandes, *Rethinking Equality: National Identity and Language Rights in the United States*, 15 TEX. HISP. J.L. & POL'Y 7, 8 (2009) (retelling the recent efforts of Yale Law Professor Amy Chua's to "mak[e] English the official national language"). In the early 1980s, a United States senator proposed a constitutional amendment "to declare English as the official language of the United States . . . opening [ ] . . . a public debate on America's cultural and linguistic identity and on the language rights of linguistic minorities." *Id.*

50. *See id.* at 8–10; *see also* Erica R. Shamblin Knott, Note, *The Decline of Linguistic Plurality: Bottom-up Solutions to Protect Languages in the United States*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 259, 265–66 (2008) (analyzing the claims of discrimination by multi-lingual proponents when cultural identity is fused with language).

51. Tamar Brandes, *Rethinking Equality: National Identity and Language Rights in the United States*, 15 TEX. HISP. J.L. & POL'Y 7, 8 n.6 (2009).

52. *See id.*

53. *See* SELECTED SOCIAL CHARACTERISTICS IN THE UNITED STATES: 2008, AMER. CMTY. SURVEY (2008), *available at* http://factfinder.census.gov/servlet/DatasetMainPage Servlet?_program=ACS (select "Data Profile," set the "Geographic Type" to "State," select the state of "Texas," and click on "Show Result"). There are twenty-seven listed different ancestries and at least five language categories listed: English, Spanish, Other Indo-European languages, Asian and Pacific Islander languages, and other languages. *Id.*

54. *Id.* (reporting the one-year estimates of the population in Texas) (select "Data Profile," set the "Geographic Type" to "State," select the state of "Texas," and click on "Show Result").

55. *Id.* (select "Data Profile," set the "Geographic Type" to "State," select the state of "Texas," and click on "Show Result").

56. It is important to note, that in context of this Article, the bilateral dispute where a dual-role mediator would typically be seen is a dispute between one non-English speaking party and an English speaking party, regardless if the parties are represented *pro se* or by counsel. There is a mass of case law and literature on how an attorney interpreting for his clients can be considered ineffective assistance of counsel. There is also a potential problem with a bilingual mediator mediating two adversarial non-English speaking parties, es-

D. *Interpretation*

In the federal arena, the Director of the Administrative Office of the United States Courts, as mandated by the Court Interpreters Act of 1978, shall implement a system to "facilitate the use of certified and otherwise qualified interpreters in judicial proceedings."[57] He or she is required to "prescribe, determine, and certify the qualifications of persons who may serve as certified interpreters" for the hearing impaired and individuals with limited English proficiency.[58]

In fact, according to Federal Rule of Evidence 604, "An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation."[59] "Interpreters must not only be conversant in English and the other language, but they must also have adequate knowledge of legal terminology, understanding of the various methods of interpretation and an understanding of ethical considerations."[60]

Currently, federal interpreter certification programs exist for three languages: Spanish-English, Navajo, and Haitian-Creole.[61] Oral and written examinations are administered to determine the skills and qualifications of the interpreters.[62] A majority of state governments have established similar certification systems.[63]

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pecially if her legal training is in English. Some American legal concepts do not translate in other foreign legal systems, and the bilingual mediator may not be familiar with both legal systems and their corresponding interrelation. Furthermore, the non-English speaking parties may not be familiar with American legal concepts, which may not exist in their native language or culture.

57. 28 U.S.C. § 1827(a) (2006). Unfortunately, the Director of the Administrative Office of the U.S. Court System is under the supervision and direction of the Judicial Conference of the United States. *Id.* § 601. This means that the regulations implemented by him are not explicitly detailed in the Code of Federal Regulations, including the certification requirements for court interpreters. *See id.* §§ 601, 602, 604.

58. *Id.* § 1827(b)(1).

59. FED. R. EVID. 604; *see also id.* 702, 703.

60. Hon. William J. Burris, *The Impact of Language Barriers to Access to Justice*, 56 LA. B.J. 416, 417 (2009) (footnote omitted).

61. Bruno G. Romero, *Here Are Your Right Hands: Exploring Interpreter Qualifications*, 34 U. DAYTON L. REV. 15, 29 (2008).

62. *Id.* at 28–29.

63. *Id.* at 29 (stating that currently thirty-two states have certification programs for court interpreters). For an overview of certification requirements for court interpreters in various states, see CONSORTIUM FOR STATE COURT INTERPRETATION CERTIFICATION, SURVEY: CERTIFICATION REQUIREMENTS 2009, *available at* http://www.ncsconline.org/D_RESEARCH/CourtInterp/Res_CtInte_ConsortCertRqmntsSurvey2009.pdf.

1. Methods

Three very different methods of interpretation are used today: simultaneous, consecutive, and summary.[64] Simultaneous interpretation "requires the [interpreter] to listen to and simultaneously interpret [the] speech of [another]."[65] Consecutive interpretation "requires intense listening of a few sentences followed by an accurate interpretation" from one language to the target language, for example, interpreting for a Spanish-speaking party to English, and if necessary, the inverse.[66] Summary interpretation is nothing more than a brief paraphrase of the spoken information.[67] The preferred methods for legal interpretation are simultaneous and consecutive interpretation; consecutive being favored more during witness testimony and simultaneous being used for longer monologues.[68] Qualified interpreters very rarely use summary interpretation, save for complex expert testimony with technical jargon, or if the interpreter has a limited vocabulary in the respective field.[69] An individual attempting to interpret and who cannot keep up in either simultaneous or consecutive interpreting is usually indicative of an incompetent interpreter, and is largely rejected by the courts.[70]

2. Interpreters vs. Bilinguals: The Battle of Language Familiarity

"[T]he mastery of at least two active languages at [or] near native level proficiency is a prerequisite for work and/or study in the field [of interpretation]."[71] In the context of any legal proceeding, especially in a

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64. Hon. William J. Burris, *The Impact of Language Barriers to Access to Justice*, 56 LA. B.J. 416, 417 n.4 (2009); Cassandra L. McKeown & Michael G. Miller, *Say What?: South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. REV. 33, 38 (2009).

65. TEX. DEP'T OF LICENSING AND REGULATION, LICENSED COURT INTERPRETERS EXAM INFORMATION, http://www.license.state.tx.us/court/examinfo.htm (last visited Feb. 14, 2011) (describing the testing requirements for court interpreter certification in Texas).

66. *Id.*

67. Cassandra L. McKeown & Michael G. Miller, *Say What?: South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. REV. 33, 39 (2009).

68. *Id.* at 38–39. A hybrid style, semi-consecutive interpretation, exists as well, and will be discussed in Part IV.B.c. of this Article, but the two methods listed above are the traditionally accepted styles of legal interpretation. *See* MARIANNE MASON, COURTROOM INTERPRETING 48–49 (2008).

69. WILLIAM E. HEWITT, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 138 (1995), *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=162.

70. *Id.*; *see* Cassandra L. McKeown & Michael G. Miller, *Say What?: South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. REV. 33, 39 (2009).

71. Cassandra L. McKeown & Michael G. Miller, *Say What?: South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. REV. 33, 40 (2009)

quasi-judicial ADR proceeding such as mediation, not only is the total mastery of two or more languages necessary, but also an advanced knowledge of legal concepts and terminology in both languages.[72] "While bilingualism is certainly a necessary criterion for accurate interpreting, it is by no means [alone] sufficient, particularly in a complex arena such as the justice system."[73] The term "bilingual" can be very misleading, referring only to linguistic skill and not assessing other factors, such as the varying degrees of familiarity, understanding, or proficiency.[74] Bilinguals rarely "maintain equal fluency in both languages[,]" on the contrary, they tend to "dominate one language or another."[75] "[A]n interpreter should [be a] true bilingual, . . . someone who is 'taken to be one of themselves by the members of two different linguistic communities, at roughly the same social and cultural level.'"[76] The difference between an interpreter and a bilingual is that an interpreter has a well-developed skill set, formalized training, and extensive preparation to effectively facilitate communica-

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(quoting Franklyn P. Salimbene, *Court Interpreters: Standards of Practice and Standards for Training*, 6 CORNELL J.L. & PUB. POL'Y 645, 659 (1997)) (internal quotation and emphasis omitted).

72. *Id.*

73. *Id.*

74. ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 64 (1992) (identifying the flaws found when utilizing the term "bilingual"). For instance, the term bilingual is utilized in grade schools to identify whether a child requires enrollment in a bilingual education program, yet these children are nowhere near competent to serve as court interpreters. There have been instances where parties must utilize family members as interpreters—"persons who have no knowledge of either the legal system, process, or substantive rights being discussed—to translate court proceedings and testimony." Nancy K. D. Lemon, *Access to Justice: Can Domestic Violence Courts Better Address the Needs of Non-English Speaking Victims of Domestic Violence?*, 21 BERKELEY J. GENDER L. & JUST. 38, 45 (2006) (citing Berta Esperanza Hernandez-Truyol, *Las Olvidadas—Gendered In Justice/Gendered Injustice: Latinas, Fronteras, and the Law*, 1 J. GENDER RACE & JUST. 354, 375 (1998)); *see also* Bruno G. Romero, *Here Are Your Right Hands: Exploring Interpreter Qualifications*, 34 U. DAYTON L. REV. 15, 17–18 (2008).

> What happens[,] however, when a bilingual has less proficiency in one language? Is she still bilingual? What if she came to the U.S. when she was twelve years old, but is now in her forties and has not studied her native language since she began school in the sixth grade? Is she bilingual? What if she only has two years of college Spanish or another foreign language? Is she bilingual? Do all bilinguals have equal command of both languages? The answer is no.

Bruno G. Romero, *Here Are Your Right Hands: Exploring Interpreter Qualifications*, 34 U. DAYTON L. REV. 15, 17 (2008) (emphasis omitted).

75. Bruno G. Romero, *Here Are Your Right Hands: Exploring Interpreter Qualifications*, 34 U. DAYTON. L. REV. 15, 18 (2008).

76. ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 64 (1992).

tion; a bilingual does not.[77] In fact, many monolingual individuals cannot tell the difference between an interpreter and a bilingual.[78]

E. *The Right to an Interpreter*

1. Constitutional Right to an Interpreter in Criminal Proceedings

There is no explicit right to an interpreter found in the Constitution. In the alternative, at least one federal circuit court has found a constitutional safeguard requiring that a non-English-speaking defendant be provided with an interpreter in criminal proceedings.[79] This safeguard is derived from the Due Process and Confrontation clauses of the Fifth,

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77. Bruno G. Romero, *Here Are Your Right Hands: Exploring Interpreter Qualifications*, 34 U. DAYTON L. REV. 15, 19 (2008).

78. *See* ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 64 (1992); *cf.* Charles M. Grabau & Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227, 257–60 (1996) (discussing the implications and problems of a judge determining the linguistic qualifications of a potential interpreter, who requires more than mere bilingualism); Michael B. Shulman, Note, *No Hablo Inglés: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 VAND. L. REV. 175, 188 (1993) (comparing the competency of an individual who is solely bilingual serving as an courtroom interpreter to a person who knows shorthand serving as a court reporter). "Even if a judge is bilingual, it is unlikely that the judge has an independent basis to determine the proposed interpreter's linguistic competency. Nevertheless, if a judge is able to determine linguistic competency, court interpretation still requires more than mere bilingualism." Charles M. Grabau & Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227, 258 (1996).

79. Unites States *ex rel.* Negron v. New York, 434 F.2d 386, 390–91 (2d Cir. 1970) (holding that the least the Court can do, when put on notice, is to provide a competent translator to assist the defendant at trial, "at the state expense if need be"). The court found the lack of interpreter violated the defendant's Sixth and Fourteenth Amendment rights. *Id.* at 389, 390–91; *see also* Court Interpreters Act of 1978, Pub. L. No. 95-539, 92 Stat. 2040 (1978) (codified as amended at 28 U.S.C. § 1827 (2006)) (delineating the requirements for the provision interpreters in United States Courts); Deborah M. Weissman, *Between Principles and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C. L. REV. 1899, 1925 (2000) (identifying the federal constitutional principles that give rise to the entitlement of an interpreter in criminal proceedings). The rights and corresponding cases "derive from the Fifth and Fourteenth Amendment Due Process Clauses, as well as from the Sixth Amendment right to confront and cross-examine witnesses and to have effective assistance of counsel." Deborah M. Weissman, *Between Principles and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C. L. REV. 1899, 1925 (2000). *See generally* Thomas M. Fleming, Annotation, *Right of Accused to Have Evidence or Court Proceedings Interpreted, Because Accused or Other Participant in Proceedings Is Not Proficient in the Language Used*, 32 A.L.R. 5TH 149 (1995). For a more thorough summary of the history behind a right to interpreter see Bill Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M. L. REV. 1, 1–8 (1990) and Diana K. Cochrane, Note, *¿Como se Dice, <Necesito a un Intérprete>?: The Civil Litigant's Right to a Court-Appointed Interpreter in Texas*, 12 SCHOLAR 47, 53–55 (2009).

Sixth, and Fourteenth Amendments.[80] One may be inclined to argue for the use of a bilingual attorney serving as an interpreter, but there is an excess of literature discussing the impropriety of a bilingual attorney serving as the interpreter for a criminal defendant.[81]

The Court Interpreters Act of 1978, its most important provision codified at 28 U.S.C. § 1827(d)(1), provides that the judge shall use a certified interpreter in judicial proceedings brought by the federal government, upon its own or another party's motion.[82] A certified interpreter is necessary when the criminal defendant, a party, or a testifying witness speaks another language primarily other than English or "suffers from a hearing impairment . . . so as to inhibit such party's comprehension of the proceedings" or communication with the judge or counsel to inhibit the presentation of that testimony.[83] This federally guaranteed right has also been extended to most state courts, by state constitutional adoption, or state legislative action.[84]

2. Possible Statutory Right to an Interpreter in Civil Proceedings

The Court Interpreters Act of 1978 only provides for an interpreter in proceedings brought by the federal government, but not civil proceedings between two individual parties.[85] Congress refers to "judicial proceeding instituted by the United States" as "all proceedings, whether criminal or civil, including pretrial and grand jury proceedings . . . conducted in, or pursuant to the lawful authority and jurisdiction of a United States district court."[86] There is no explicit or implicit language from Congress regarding an interpreter in mediation.[87] The individuals in a civil proceeding may look to 28 U.S.C. § 1827(g)(4) in order to request the assistance of an interpreter, but this subsection only provides an interpreter on cost-reimbursable or prepaid basis, if at all possible.[88]

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80. *See Negron*, 434 F.2d at 389–91 (extracting the constitutional safeguard to an interpreter from the Sixth and Fourteenth Amendments).

81. *See, e.g.*, Debra L. Hovland, Note, *Errors in Interpretation: Why Plain Error is Not Plain*, 11 LAW & INEQ. 473, 490 n.105 (1993) (evaluating the effects of the attorney as the interpreter for her client.); Juan F. Perea, Hernandez v. New York: *Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1, 22 (1992) (expressing the concerns of the accuracy of interpreters in judicial proceedings) (citing Bill Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M. L. REV. 1, 8–9 (1990)).

82. 28 U.S.C. § 1827(d)(1) (2006).

83. *Id.*

84. *See* Kelly Kaiser, Note, *A Lawyer's Guide: How to Avoid Pitfalls When Dealing with Alien Clients*, 86 KY. L.J. 1183, 1199, 1201–02 (1998).

85. *See* 28 U.S.C. § 1827(d)(1) (2006).

86. *Id.* § 1827(j).

87. *See id.* § 1827.

88. *Id.* § 1827(g)(4); *see also* H.R. REP. NO. 104-798 at 24 (1996).

The federal government has not found it necessary to provide an interpreter in civil proceedings, but various state legislatures have provided for one in civil proceedings. Texas has provided for an interpreter in either a criminal or civil proceeding upon motion by a party or if requested by a witness.[89] Oregon's statute allows for a qualified interpreter in all civil or criminal proceedings where there is "a non-English-speaking party."[90] Arkansas provides for an interpreter for any witness or party to "[e]very person who cannot speak or understand the English language or who because of hearing, speaking, or other impairment has difficulty in communicating with other persons."[91] Similarly, Arizona provides a qualified interpreter for the deaf in any role in a civil or criminal case to "interpret the deaf person's testimony," even providing the interpreter for preparations with her attorney.[92] California also provides an interpreter for the hearing impaired in any civil or criminal action, and the California legislature went so far as to explicitly mention court-ordered ADR proceedings.[93]

California's mention of court-ordered ADR proceedings in its right to an interpreter statute is also important for another reason. There may be some confusion, depending on the jurisdiction, as to whether the term "civil proceedings" encompasses ADR proceedings as well.[94] The explicit mention of court-ordered ADR proceedings leaves no ambiguity as to whether an interpreter will be provided for pretrial ADR settlement proceedings.

F. *Family Law Mediation*

At the inception of mediation in the 1960s, the major focus was labor dispute mediation, but upon entering the court system in the late 1970s, it directed its attention to settlement diversion and the upcoming field of

89. TEX. GOV'T CODE ANN. § 57.002(a) (West Supp. 2010).

90. OR. REV. STAT. § 45.275(1)(a)–(b) (2009).

91. ARK. CODE ANN. § 16-64-111(a) (2005).

92. ARIZ. REV. STAT. ANN. § 12-242(A) (2003).

93. CAL. EVID. CODE § 754(b) (Deering 2004).

94. For instance, in a civil proceeding brought by the United States government in federal court, the Court Interpreters Act of 1978, 28 U.S.C. § 1827(d)(1) (2006) provides for an interpreter in the proceeding. *See* 28 U.S.C. § 1827(d)(1) (2006). When used in conjunction with the Alternative Dispute Resolution Act of 1998 (codified at 28 U.S.C. § 651), the civil litigant should be provided with an interpreter upon request or motion during the court-ordered ADR procedure. But on the contrary, if the proceeding was not instituted by the United States, then the litigant would not be provided with an interpreter, unless requested by the party and it would only be upon request of the "presiding judicial officer . . . where possible." *See id.* § 1827 (d)(l), (g)(4).

divorce and family cases.[95] Court-ordered mediation has gained the most popularity in contested family law situations, where the implications are tremendous.[96] Family law mediation is now authorized in almost every state by court rule or statute.[97] Family law is a complex specialty,[98] and the use of court-ordered mediation has been seen with divorce[99] and its economic aspects,[100] child custody cases,[101] domestic abuse,[102] and legal

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95. *See* Robert A. Baruch Bush, *Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades*, 84 N.D. L. REV. 705, 709–20 (2008) (detailing the four different historical phases of mediation in the courts); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 174–81 (2003) (charting the rise of alternative dispute resolution among courts during the 1960s and 1970s).

96. *See* Jaime Abraham, Note, *Divorce Mediation—Limiting the Profession to Family/Matrimonial Lawyers*, 10 CARDOZO J. CONFLICT RESOL. 241, 242–46 (2008); Alison Gerencser & Megan Kelly, *Family Mediation: An Alternative to Litigation*, 68 FLA. B.J. 49, 49 (1994); *see also* Brian Edwards, Note, *True Donative Freedom: Using Mediation to Resolve the Disparate Impact Current Succession Law Has on Committed Same-Gender Loving Couples*, 23 OHIO ST. J. ON DISP. RESOL. 715, 741–45 (2008).

97. Elizabeth Kruse, Comment, *ADR, Technology, and New Court Rules—Family Law Trends for the Twenty-First Century*, 21 J. AM. ACAD. MATRIM. LAW. 207, 208 (2008); *see* Brian Edwards, Note, *True Donative Freedom: Using Mediation to Resolve the Disparate Impact Current Succession Law Has on Committed Same-Gender Loving Couples*, 23 OHIO ST. J. ON DISP. RESOL. 715, 744 (2008). For a thorough analysis of the state of Family and Divorce Mediation Law in the United States, Westlaw has completed a fifty state statutory survey analyzing the mediation requirements state by state, available at 0080 SURVEYS 12.

98. *See* Jaime Abraham, Note, *Divorce Mediation—Limiting the Profession to Family/Matrimonial Lawyers*, 10 CARDOZO J. CONFLICT RESOL. 241, 242 (2008); Stephanie A. Henning, Note, *A Framework for Developing Mediator Certification Programs*, 4 HARV. NEGOT. L. REV. 189, 215 (1999).

99. Jaime Abraham, Note, *Divorce Mediation—Limiting the Profession to Family/Matrimonial Lawyers*, 10 CARDOZO J. CONFLICT RESOL. 241, 242–43 (2008).

100. N.J. STAT. ANN. § 5:5-6 (West 2009) (requiring economic aspects of a divorce to be handled through a "post-Matrimonial Early Settlement Program" mediation); *see generally* Chip Rose, *Mediating Financial Issues: Theoretical Framework and Practical Applications*, *in* DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 180–208 (Jay Folberg et al. eds., 2008).

101. L. Wayne Scott, *The Law of Mediation in Texas*, 37 ST. MARY'S L.J. 325, 333 (2006) (discussing the use of mediation in suits affecting the parent-child relationship under Texas Family Code § 153.0071); Frank V. Ariano, *A Lawyer's Guide to Preparing Clients for Family Law Mediation*, 90 ILL. B.J. 600, 600–01 (2002) (explaining that the Illinois Family Code § 602.1 provides for mediation in suits for joint custody).

102. *See* KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 486–87 (3d ed. 2004) (providing issues to consider in mediation mandated by courts in cases involving domestic violence); *see also* Ann L. Milne, *Mediation and Domestic Abuse*, *in* DIVORCE AND FAMILY MEDIATION 304, 309 (Jay Folberg et al. eds., 2004) (showing the differing viewpoints regarding the use of mediation in cases of domestic abuse). "Many victim advocates assert that mediation is potentially unsafe and can result in unfair agreements as the dynamics of the abusive relationship are enacted in the mediation process. Mediation

separation.[103]

Family law is a prime candidate for the mutually-agreed settlement that mediation can provide because of the interconnected and enduring nature of family relationships as well as the intertwined legal and emotional issues.[104] But, "generic" mediation is not an appropriate approach to family law issues.[105] The prototypical family law mediation is a long-term process, segmented into much smaller sessions, until a resolution is reached regarding property and custody.[106] Because of the hotly contested issues with serious implications, many states now require additional training for mediators in family law mediations.[107]

III. ETHICS

A. *Ethics of an Attorney-Mediator*

A mediator's ethical considerations include a multitude of issues, but focus primarily on the mediator's neutrality and confidentiality.[108] Although it is important to remember that in most jurisdictions a third-party neutral does not necessarily have to be an attorney,[109] a discussion of non-lawyer led mediation is outside of the scope of this Article. There is

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proponents counter that mediation can be an empowering process and a better alternative than . . . litigation and adjudication." Ann L. Milne, *Mediation and Domestic Abuse*, *in* DIVORCE AND FAMILY MEDIATION 304, 309 (Jay Folberg et al. eds., 2004).

103. TENN. CODE. ANN. § 36-4-131(a) (2010).

104. 4 AM. JUR. 2D *Alternative Dispute Resolution* § 30 (2007); Ann L. Milne et al., *The Evolution of Divorce and Family Mediation*, *in* DIVORCE AND FAMILY MEDIATION 3, 3 (Jay Folberg et al. eds., 2004); Bette J. Roth et al., *Family Law Mediation: Introduction*, in 1 ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 31:1 (Kenneth Cloke et al. eds., 2010). *But see* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 180 (2003) (detailing how mediation in family law cases may not be cheaper or more efficient).

105. KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 484 (3d ed. 2004). Here, "generic" mediation is used to describe a prototypical single session mediation where the issues are hammered out to reach a mutually agreeable settlement, but not rekindling or furthering any continued relationships. *Id.* These continued relationships are vital to the stability and development of a young child.

106. *Id.*

107. *See id.* at 485–86.

108. *See id.* at 395 (introducing conceptual difficulties, if not impossibilities, of separating a mediator's ethical considerations from standards of practice); *see also* Andrea C. Yang, *Ethics Codes for Mediator Conduct: Necessary but Still Insufficient*, 22 GEO. J. LEGAL ETHICS 1229, 1231 (2009) (questioning the effectiveness of codification of ethical parameters for mediators).

109. *See* MODEL RULES OF PROF'L CONDUCT R. 2.4 cmt. 2 (2009) (stating that "in some court-connected contexts, only lawyers are allowed to serve in this role" as a third-party neutral); GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 25A.2 n.1 (3d ed. Supp. 2009) (informing that "several states have adopted statutes governing the mediator and arbitrator roles, whether performed by a lawyer or by another"). More im-

no definitive controlling code of ethics for mediators,[110] but various institutions and organizations have created their own in an attempt to regulate the practice.[111] Many states have adopted their own codes and rules,[112] but, similar to the ethical standards for attorneys set by the ABA's MRPC, those codes and rules are sometimes nothing more than aspirational goals.[113] The Texas Supreme Court approved and adopted the "Ethical Guidelines for Mediators" proposed by the ADR Section of the State Bar of Texas, which applies to all court-ordered mediations.[114] Unfortunately, these guidelines are only aspirational and do not serve as "disciplinary rules or a code of conduct."[115]

Currently, the most significant ethical guidelines for mediators come from the "Model Standards of Conduct for Mediators," (Model Standards) a collaborative effort by the ABA, American Arbitration Association, and the Association for Conflict Resolution.[116] The Model Standards are organized into nine distinct standards, with the hope of "serv[ing] as fundamental ethical guidelines for persons mediating in all practice contexts."[117] The drafter's three primary goals behind the Model

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portantly, regardless of the normal profession of the third-party neutral, they are still governed by professional codes distinct from the MRPC. *Id.*

110. *See* GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 25A.2 (3d ed. Supp. 2005) ("However, precisely because [ABA MRPC] Rule 2.4 deals with a situation in which clients are *not* involved, it contains little prescriptive content of its own, and functions largely as a descriptive rule that serves as a reminder about what *other* rules and legal principles might be applicable." (emphasis in original)); *see also* 1 SARAH R. COLE ET AL., MEDIATION: LAW, POLICY & PRACTICE § 9:2, at 9-6 (2d ed. 2010) (relating the policy principles behind ethical guidelines concerning confidentiality).

111. *See* KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 399 (3d ed. 2004); L. Wayne Scott, *The Law of Mediation in Texas*, 37 ST. MARY'S L.J. 325, 341–42 (2006) (analyzing the lack of an officially sanctioned guideline for mediators until recently, but describing the various organizational guidelines that exist). For a listing of a variety of organizational guidelines including attempts by the ABA, State Bar of Texas, Association of Attorney-Mediators, see L. Wayne Scott, *The Law of Mediation in Texas*, 37 ST. MARY'S L.J. 325, 341 n.81 (2006).

112. *See generally* Suzanne McCorkle, *The Murky World of Mediation Ethics: Neutrality, Impartiality, and Conflict of Interest in State Codes of Conduct*, 23 CONFLICT RESOL. Q. 165, 167–70 (2005).

113. KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 400 (3d ed. 2004).

114. *See* 14 FRANK W. ELLIOTT & NANCY SAINT-PAUL, TEXAS PRACTICE: TEXAS METHODS OF PRACTICE § 76.15 pmbl (2d ed. 1996).

115. *Id.*

116. MODEL STANDARDS OF CONDUCT FOR MEDIATORS 2 (Arbitra. Ass'n, & Ass'n for Conflict Resolution 2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf; Andrea C. Yang, *Ethics Codes for Mediator Conduct: Necessary but Still Insufficient*, 22 GEO. J. LEGAL ETHICS 1229, 1231 (2009).

117. MODEL STANDARDS OF CONDUCT FOR MEDIATORS pmbl. (Arbitr. Ass'n, & Ass'n for Conflict Resolution 2005), *available at* http://www.abanet.org/dispute/documents/

Standards are: "to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes."[118]

1. Neutrality

Neutrality, often also referred to as impartiality, is defined in the Model Standard II as "freedom from favoritism, bias or prejudice."[119] Several other codes of ethics define neutrality as "'scrupulously giving each disputant equal attention and doing exactly what is needed by each disputant.'"[120] One key ethical guideline for attorney-mediator neutrality comes from the ABA's MRPC Rule 2.4.[121] Unfortunately, that rule is quite limited in the restrictions placed on the attorney-mediator.[122]

First, it is important to note that an attorney-mediator does not represent either one of the parties.[123] It is her duty to inform and explain to the unrepresented parties that she does not represent them in the matter, and in addition, her overall role in the proceedings.[124] Her obligation is to serve as the third party neutral to "assist[ ] two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other

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model_standards_conduct_april2007.pdf; *accord* Andrea C. Yang, *Ethics Codes for Mediator Conduct: Necessary but Still Insufficient*, 22 GEO. J. LEGAL ETHICS 1229, 1235–36 (2009).

118. MODEL STANDARDS OF CONDUCT FOR MEDIATORS pmbl (Arbitr. Ass'n, & Ass'n for Conflict Resolution 2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

119. *Id.*

120. Suzanne McCorkle, *The Murky World of Mediation Ethics: Neutrality, Impartiality, and Conflict of Interest in State Codes of Conduct*, 23 CONFLICT RESOL. Q. 165, 166 (2005). In addition, "the mediator should be neutral to the content but active in controlling the process, which is to say not neutral toward the process." *Id.*

121. MODEL RULES OF PROF'L CONDUCT R. 2.4(b) (2009).

122. *See id.* (indicating with specificity the boundaries of this rule, wherein if the mediator "knows or reasonably should know that a party does not understand" his or her role as a mediator, it must be explained); *see also* RONALD D. ROTUNDA & JOHN S. DZEINKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE § 2.4-2 at 673 (2006–2007 ed. 2006) (describing how the rule does not address whether the third-party neutral should draft agreements, whether to explain legal consequences of the parties' actions, and whether to inform or disclose potential biases, obligations of confidentiality, or fees). The rule is lacking because there is no general consensus about the standards and regulations concerning those issues in regard to a third-party neutral. RONALD D. ROTUNDA & JOHN S. DZEINKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE § 2.4-2 at 673 (2006–2007 ed. 2006) .

123. MODEL RULES OF PROF'L CONDUCT R. 2.4 & cmt. 3 (2009) (explaining how lawyers serving as mediators face the problem of two different roles—either as a third-party neutral, or as a lawyer representing a client); *see also id.* at R. 4.3 (2009) (requiring a lawyer to explain to the unrepresented party that he does not represent them).

124. *Id.* at R. 2.4(b).

matter that has arisen between them."[125] As a neutral, her obligation is to remain impartial during the entire mediation process, even before and after the session.[126] According to Texas law, she "may not compel or coerce the parties to enter into a settlement agreement," but she is permitted to encourage and assist them to achieve an agreed resolution.[127]

2. Confidentiality

Confidentiality may be the most important aspect of mediation practice.[128] In fact, confidentiality helps the mediator maintain the perception of impartiality.[129] Ideally, "[a] good mediator makes it abundantly clear before starting the mediation process that whatever is said by the parties, their lawyers, and the mediator is confidential unless express per-

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125. *Id.* at R. 2.4(a); *see also* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 47–48 (1996) (conceptualizing the importance of mediator neutrality with an example). The example the author mentions proposes two worthwhile considerations as to the role of a mediator: evaluation and facilitation. *Id.* In this example the reader is asked to consider the impact the mediator, who is already familiar with opposing counsel, will have on the mediation; conversely, this familiarity may work towards facilitation of the mediation itself, as this "may be the only way to get the case into mediation." *Id.* The author is quick to caution that as an attorney, one should be sure that the mediator would be able "to commit to and carry out a facilitative process." *Id.*

126. KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 211 (3d ed. 2004). The author mentions how the term neutrality is also referred to as "*impartiality; free from prejudice or bias; not having a stake in the outcome*; and *free from conflict of interest*," as well as "*unbiased, indifferent* and *independent*." *Id.* at 212 (emphasis in original). Even though the terms "neutrality" and "impartiality" are similar and used interchangeably, some mediators argue that the two terms are distinct and should not be confused. *Id.*

127. TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(a) (West 2005).

128. *See* Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 722 (1997) (mentioning how the mediation process would be ineffective if the parties did not believe that the proceedings would be confidential); *see also* Tex. Comm. on Prof'l Ethics, Op. 496, 57 TEX. B.J. 1135, 1135 (1994) (identifying the public policy of "encourag[ing] voluntary resolution of disputes and early settlement of litigation").

129. Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 722 (1997). A primary goal of a mediator is to gain the trust of the parties, and in doing so the mediator "must be able to guarantee they will not later testify against any party if the mediation does not result in a viable agreement." *Id.* at 722–23. In addition, confidentiality also serves to foster mediation over litigation, which in turn keeps the dispute private. *Id.* at 723.

mission is given to disclose the information. *Confidentiality is vital to mediation.*"[130]

Model Standard V provides an ethical standard that states can apply for confidentiality.[131] According to Standard V, "[a] mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law."[132] He may only disclose confidential information acquired during the mediation if the parties agree, and he should not tell others about the mannerisms of the participants during the mediation session.[133] He is only authorized to report whether a mutually settled agreement was reached during the mediation and who attended the session.[134]

The ethical guidelines and requirements regarding confidentiality differ from state to state, based mostly on case law and state-specific statutory guidelines.[135] Typically, there are no records kept of a mediation session,

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130. Sheldon E. Friedman, *The Basics of Effective Mediation*, 38-AUG. COLO. LAW. 73, 75–76 (2009) (emphasis added). The author concludes that in order to settle a dispute, an effective mediator possesses several skills, including "[a]rtful persuasion, clear communication, and trustworthiness." *Id.* at 76.

131. *See generally* MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Am. Arbitr. Ass'n, & Ass'n for Conflict Resolution 2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf (establishing the standards of conduct for confidentiality that a mediator is expected to maintain). Under the Texas Standards, "[a] mediator should not reveal information made available in the mediation process, which information is privileged and confidential, unless the affected parties agree otherwise or as may be required by law." 14 FRANK W. ELLIOTT & NANCY SAINT-PAUL, *Texas Practice: Texas Methods of Practice* § 76.15, 8 (2d ed. 1996). Comment (a) mandates the mediator to not record or transcribe the mediation proceedings, (b) requires confidentiality in the storage and disposal of the mediation materials, and requires anonymity if used for later purposes, (c) requires the confidentiality of information obtained via caucus and only allows the mediator to disclose if the mediation happened, and whether an agreement was reached, or if the mediation was recessed or reset, and finally (d) allows certain instances of disclosure if required by applicable law. *Id.* cmt. (a)–(d).

132. MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Am. Arbitr. Ass'n, & Ass'n for Conflict Resolution 2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

133. *Id. But see* Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 327 (1994) (explaining how mediators use private information indirectly to help the parties reach an agreement).

134. MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Am. Arbitr. Ass'n, & Ass'n for Conflict Resolution 2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf; *see also* 1 SARAH R. COLE ET AL., MEDIATION: LAW, POLICY & PRACTICE § 9:26 (2d ed. 2010) (recognizing that a mediator's report, if it contains any additional material other than if a settlement was reached and who attended the mediation, "may have a number of effects on the mediation process").

135. *See* Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 425 (1997). Other potential methods of protection concerning settlement discussions can come

which makes it difficult to introduce evidence concerning settlement discourse during litigation.[136] It is also important to note that a majority of jurisdictions limit or prohibit the admissibility of the settlement discussions into evidence.[137] Also, the parties can agree as to the degree of confidentiality they would like during their mediation.[138] In order to avoid any loopholes in the confidentiality standards found in the state statutes, parties should contract for confidentiality of the mediation as well.

The caucus model[139] is the dominant form of mediation, at least in Texas, and is the primary method mediators use to obtain confidential

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from rules of civil procedure, laws of privilege, agreements not to disclose, evidence covered by protective order, and even threats for damages by the opposing parties on breaching agreements not to disclose. 1 SARAH R. COLE ET AL., MEDIATION: LAW, POLICY & PRACTICE § 9:1 (2d ed. 2010). It is vital to note that there is a controversy amongst various states' legislation and the Uniform Mediation Act (which has been adopted in the District of Columbia, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, Utah, Vermont, and Washington) regarding the degree of confidentiality in mediation. *See* CAL. R. CT. 3.854 (Deering 2011) (allowing blanket confidentiality); FLA. STAT. ANN. §§ 44.401–.406 (West Supp. 2011) (applying a complex standard and system of confidentiality in mediation); MASS. ANN. LAWS ch. 233, § 23C (LexisNexis 2009) (permitting a blanket rule of confidentiality). The Uniform Mediation Acts' standard allows confidentiality to the extent agreed by the parties or otherwise provided by law, albeit it does provide certain evidentiary privileges to assure confidentiality in subsequent legal proceedings. *See e.g.*, D.C. CODE §§ 16-4201–16-4213 (LexisNexis 2008); IDAHO CODE ANN. §§ 9-801–9-814 (2010); 710 ILL. COMP. STAT. ANN. §§ 35/1 to 35/99 (West 2009); IOWA CODE §§ 679C.101–.115 (West, Westlaw through 2010 Reg. Sess.); NEB. REV. STAT. §§ 25-2930–25-2943 (2008); N.J. STAT. ANN. §§ 2A:23C-1–2A:23C-13 (West 2010); OHIO REV. CODE. ANN. §§ 2710.01–.10 (West 2006); UTAH CODE ANN. §§ 78B-10-101–78B-10-114 (LexisNexis 2008); VT. STAT. ANN. tit. 12, §§ 5711–23 (Supp. 2010); WASH. REV. CODE. ANN. §§ 7.07.010–7.07.904 (West 2007).

136. Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 425 (1997); *see also* 1 SARAH R. COLE ET AL., MEDIATION: LAW, POLICY & PRACTICE § 9:1 (2d ed. 2010).

137. *See* FED. R. EVID. 408; UNIF. RULES OF EVIDENCE 408 (amended 1988), 13C U.L.A. 56 (2004). The 1974 Uniform Rules of Evidence, amended in 1986, have been adopted in thirty-three states and are very similar to the Federal Rules of Evidence. Unif. Rules of Evidence 74 References & Annotations. *See also* 29 AM. JUR. 2D *Evidence* § 519 (2008); Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 425 (1997).

138. Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 425 (1997) (relating the benefits and implications a confidentiality agreement can have on a mediation).

139. Caucusing occurs when the mediator physically separates both parties to talk to each individually rather than altogether. DOUGLAS N. FRENKEL & JAMES H. STARK, THE PRACTICE OF MEDIATION 193 (2008); RUSSELL KOROBKIN, NEGOTIATION: THEORY AND STRATEGY 347 (2d ed. 2009).

information during mediation sessions.[140] The use of private information is important because "mediators can create value by controlling the flow of private information (variously eliminating, translating, or even creating it) to mitigate adverse selection and moral hazard."[141] Russell Korobkin explains the use of private caucuses and the power behind the information they reveal as such: "A skillful mediator can [help achieve] a mutually beneficial settlement agreement by using private caucuses to obtain private information from each party but only revealing portions of that information to the other party, and only under particular circumstances."[142] But, if the mediator conducts private caucuses, he must seek consent before disclosing the private information obtained.[143] The mediator must also inform the parties regarding the extent of the confidentiality, as well as the varying levels of that confidentiality depending on the circumstances.[144]

Korobkin continues by relating the two extremes in the effectiveness of the confidential information: if the mediator reveals all of the private information to the other side, then no one will reveal any more information during the caucuses; but on the other hand, if the mediator promises not to use any of the information, even indirectly, then the private information would not be useful in reaching an agreement, unless the mediator can gain permission to use the information.[145]

B. *Ethics of an Interpreter*

1. Federal and State Standards

The Administrative Office for the U.S. courts has set out a document entitled "Standards of Performance and Professional Responsibility" (Standards) that applies to contract court interpreters in the federal

140. *See* RUSSELL KOROBKIN, NEGOTIATION: THEORY AND STRATEGY 335 (2d ed. 2009) (stating that the confidential information can help the mediator guide parties toward the bargaining zone); Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 325–26 (1994) (explaining how mediators obtain the confidential information through a technique known as "caucusing").

141. Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 327 (1994).

142. RUSSELL KOROBKIN, NEGOTIATION: THEORY AND STRATEGY 335 (2nd ed. 2009).

143. *See* MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard 5 (Am. Arbitr. Ass'n, & Ass'n for Conflict Resolution 2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

144. *See id.*

145. RUSSELL KOROBKIN, NEGOTIATION: THEORY AND STRATEGY 335 (2d ed. 2009); *see also* Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 326 (1994).

courts.[146] The Preamble details how all certified or contract interpreters, as sworn officers of the court, bring specialized language skills and impartiality to judicial proceedings.[147] Federal court interpreters are held to the various standards and duties: accuracy and completeness in the interpretation, truthful representation of the interpreter's qualifications, a duty of impartiality, disclosure of conflicts of interest, professional demeanor, confidentiality, a scope of practice, and a duty to report ethical violations.[148] During the judicial proceedings, the interpreter is held to the standard of an expert and is sworn to make a truthful interpretation and translation.[149]

Various provisions in the Standards are important to identify. The duty of impartiality prohibits the interpreter from conversing with the parties and their friends and relatives, witnesses, jurors, and attorneys during the proceedings.[150] The scope of practice of the interpreters is limited solely to interpretation and translation, prohibiting the interpreter from "*giv[ing] legal advice*, express[ing] personal opinions to individuals for whom they are interpreting, or *engag[ing] in any other activities which may be construed to constitute a service other than interpreting or translating while serving as an interpreter.*"[151]

For instance, in Texas, Chapter 57 of the Texas Government Code requires the Texas Department of Licensing and Regulation to certify state court interpreters.[152] The Texas Board for Evaluation of Interpreters, a division of the Department of Assistive and Rehabilitative Services, requires applicants for certification to sign a Code of Ethics agreeing to abide by them.[153] Texas is also a member to the National Center for

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146. *See generally* ADMIN. OFFICE OF THE U.S. COURTS, STANDARDS OF PERFORMANCE AND PROFESSIONAL RESPONSIBILITY, *available at* http://www.uscourts.gov/uscourts/FederalCourts/Interpreter/Standards_for_Performance.pdf.

147. *Id.* at pmbl.

148. *Id.* at 1–9.

149. *See* FED. R. EVID. 604. Interestingly, Rule 604 seems to use the term translation and interpretation interchangeably, further proving the general misunderstanding of the different practices. *See id.*

150. ADMIN. OFFICE OF THE U.S. COURTS, STANDARDS OF PERFORMANCE AND PROFESSIONAL RESPONSIBILITY Standard 3, *available at* http://www.uscourts.gov/uscourts/FederalCourts/Interpreter/Standards_for_Performance.pdf.

151. *Id.* at 7 (emphasis added).

152. TEX. GOV'T CODE ANN. §§ 57.021–.022 (West 2005).

153. DEP'T OF ASSISTIVE AND REHABILITATIVE SERV., *DHHS Board for Evaluation of Interpreters Chapter 3: Court Interpreter Certification.* The Code of Ethics and Professional Responsibility of Certified Court Interpreters employed by Texas is a replica of the same code established by the National Association for Judiciary Interpreters and Translators, which is discussed below. *See* 16 TEX. ADMIN. CODE § 80.100 (2009) (Tex. Dep't of Licensing and Reg., Code of Ethics and Professional Responsibility); CODE OF ETHICS AND PROF'L RESPONSIBILITY (Nat'l Ass'n of Judiciary Interpreters and Translators), *re-*

State Courts' Consortium for State Court Interpreter Certification, which pools and standardizes certification tests for court interpreters amongst its forty member states.[154] The Consortium currently provides testing for eighteen different languages, far more than the three provided at the federal level.[155]

2. Professional Organization Standards

The National Association of Judiciary Interpreters and Translators (NAJIT), a professional organization for court interpreters, has developed its own Code of Ethics and Professional Responsibility.[156] All NAJIT's members must comply with the eight ethical canons set out in the code.[157] Similar to the Standards, the eight canons obligate the interpreters to the duties and standards of accuracy, impartiality, disclosing of conflicts of interest, confidentiality, limitations of practice, protocol and demeanor, "maintenance and improvement of skills and knowledge," "accurate representation of credentials," and reporting impediments to compliance.[158]

The NAJIT's code also has relevant language that needs to be identified. Canon 2 regarding impartiality and conflicts of interest requires the interpreters to "avoid[ ] unnecessary contact with the parties[,]" and more importantly, they "*shall abstain from comment* on cases in which

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printed in MARIANNE MASON, COURTROOM INTERPRETING app. 2, at 107–09 (2008). For a compiled listing of various interpreter codes among the various court systems, including state, federal, and foreign, see Interpreter Codes (March 2009), http://www.courtethics.org/Ethics%20Codes%20USA.htm.

154. *See* Cassandra L. McKeown & Michael G. Miller, *Say What?: South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. REV. 33, 87 (2009) (stating the purpose and membership of the Consortium); NAT'L CTR. FOR STATE COURTS, CONSORTIUM FOR LANGUAGE ACCESS IN THE COURTS: LIST OF MEMBER STATES (2009), *available at* http://www.ncsconline.org/D_Research/CourtInterp/Res_CtInte_ConsortMemberStatesPubNove07.pdf (listing the member states and the date they joined).

155. *See* Bruno G. Romero, *Here Are Your Right Hands: Exploring Interpreter Qualifications*, 34 U. DAYTON L. REV. 15, 29 (2008) (examining interpreter qualifications for defendants, and how to select a qualified interpreter for non-English speakers).

156. *See generally* CODE OF ETHICS AND PROF'L RESPONSIBILITY (Nat'l Ass'n of Judiciary Interpreters and Translators), *reprinted in* MARIANNE MASON, COURTROOM INTERPRETING app. 2, at 107 (2008) (providing uniform standards on ethics and professional responsibility to guide court interpreters in their work).

157. *Id.*

158. *See id.* at 107–09 (2008) (providing a uniform code of ethics and professional responsibility for court reporters to follow, while also encouraging them to use their own judgment); *see also* ADMIN. OFFICE OF THE U.S. COURTS, STANDARDS FOR PERFORMANCE AND PROFESSIONAL RESPONSIBILITY FOR CONTRACT COURT INTERPRETERS IN THE FEDERAL COURTS Standard 1–9, *available at* http://www.uscourts.gov/uscourts/FederalCourts/Interpreter/Standards_for_Performance.pdf (providing performance and responsibility standards for court interpreters working in the Federal system).

they serve."[159] Canon 3 on confidentiality prohibits the disclosure of privileged or confidential information acquired during the interpretation proceedings without authorization.[160] Finally, Canon 8 requires the interpreter to report "any circumstance or condition that impedes full compliance with any Canon" including unfamiliarity with specialized terminology being used, the inability to hear, and arguably, the most important ethical consideration an interpreter faces, interpreter fatigue.[161]

Other professional organizations for interpreters in different settings have also adopted their own codes of ethics. For example, the National Council on Interpreting in Health Care allows a health care interpreter to act as an advocate for the patient in order to support good health outcomes.[162] The Registry of Interpreters for the Deaf has seven general ethical tenets, including confidentiality and conduct.[163] The conduct tenet contains a useful illustration that can serve as a guide in the context of the court interpreter as a mediator, as well: interpreters are to "[a]void performing dual or conflicting roles in interdisciplinary . . . settings."[164]

3. Interpreter Fatigue

Interpreter fatigue occurs as a result of the highly taxing cognitive functions required in bilingual interpretation.[165] Typically, simultaneous interpretation is done in court proceedings which requires the interpreter to simultaneously listen to the message, recall it, and convert it to the

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159. *See* CODE OF ETHICS AND PROF'L RESPONSIBILITY Canon 2 (Nat'l Ass'n of Judiciary Interpreters and Translators), *reprinted in* MARIANNE MASON, COURTROOM INTERPRETING app. 2, at 108 (2008) (emphasis added) (encouraging the parties to remain neutral, and to immediately report any conflict of interest to the court).

160. CODE OF ETHICS AND PROF'L RESPONSIBILITY Canon 3 (Nat'l Ass'n of Judiciary Interpreters and Translators), *reprinted in* MARIANNE MASON, COURTROOM INTERPRETING app. 2, at 108 (2008). The authorization specified by NAJIT is ambiguous and does not refer to the proper authority that would allow for the disclosure. *See id.* This authority could be interpreted to mean the court, agreement from the parties, the person who divulged the information, and so on.

161. *See id.* At 109 (setting out some impediments to compliance and directing interpreters to decline working under conditions where avoiding impediments to the Canon would be impossible).

162. NAT'L COUNCIL ON INTERPRETING IN HEALTH CARE, A NATIONAL CODE OF ETHICS FOR INTERPRETERS OF HEALTH CARE 3 (2004), *available at* http://data.memberclicks.com/site/ncihc/NCIHC%20National%20Code%20of%20Ethics.pdf.

163. REGISTRY OF INTERPRETERS FOR THE DEAF, CODE OF PROFESSIONAL CONDUCT (2005), *available at* http://www.rid.org/UserFiles/File/NAD_RID_ETHICS.pdf (describing in detail the guiding principles and proper behavior to be followed by interpreters for the deaf for each tenet).

164. *Id.* at 2 (laying out the professional behavior that should be exhibited by interpreters for the deaf).

165. MARIANNE MASON, COURTROOM INTERPRETING 9 (2008).

second language, all while continuing to listen for more material.[166] The interpreter's memory becomes tired and can severely hamper the ability to convert from one language to another.[167] Many individuals incorrectly believe that a court interpreter is expected to provide a literal rendition of the proceedings, when in fact the interpreter's responsibility is to maintain the style and context of the original message.[168]

IV. MEDIATION WITH A DUAL-ROLE MEDIATOR SHOULD NOT BE DONE

The central issue here is whether it is appropriate for a bilingual individual to serve a dual-role as both the mediator and the interpreter. Suzanne McCorkle defines a dual-role as "a professional fulfilling the role of two professions for one or both clients at the same time during mediation."[169] The first subpart of this section discusses how serving in a dual-role is unethical because, when combined, the dual-role jeopardizes the neutrality and confidentiality of each individual role. The second subpart of this section explains why a bilingual mediator serving in the dual-role may initially seem convenient, but in actuality is inefficient. A lack of interpretation experience, combined with the effects of interpreter fatigue, hampers the effectiveness of serving in such a capacity. The presence of these factors eventually leads to a substandard performance in the collective dual-role, as well as the individual mediator and interpreter roles.

Before proceeding into the analysis, this Article poses a hypothetical situation in order to assist readers in conceptualizing a scenario where a dual-role bilingual mediator could be used. The quintessential example of where a dual-role bilingual mediator can do significant damage is in the context of family law.[170] A court-ordered mediation arising from a

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166. *See id.* at 8 (explaining how the different tasks of the interpreter make for a strain on their cognitive abilities).

167. *Id.* at 9.

168. *See id.* at 7–8 (explaining how the "verbatim requirement" actually refers to providing a verbatim *meaning* instead of a verbatim *translation* of each word). For example, if a witness stutters over an answer, and is clearly uncertain, the translator should be able to translate the uneasiness and uncertainty of the witness. *Id.* at 8. This is important because the judge or jury should have the same feeling about the witness's response as they would for an English-speaking witness who did not need an interpreter. *Id.*

169. Suzanne McCorkle, *The Murky World of Mediation Ethics: Neutrality, Impartiality, and Conflict of Interest in State Codes of Conduct*, 23 CONFLICT RESOL. Q. 165, 178 (2005).

170. *See* Isolina Ricci, *Court-Based Mandatory Mediation*, *in* DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 397, 412–13 (Jay Folberg et al. eds., 2004) (explaining the difficulties posed by mediation scenarios with culturally diverse parties). It is quite possible that the culture and customs of a participant at a family law

hypothetical divorce,[171] which encompasses a suit affecting the parent-child relationship,[172] will serve as an analytical guide to demonstrate how the dual-role bilingual mediator can harm the adversarial parties, and more importantly, the children.[173]

In this hypothetical, there is a dissolving marriage with three children. Father is a native Spanish speaker and has a very limited knowledge of the English language.[174] He was only educated up to the sixth grade in the Mexican public school system.[175] He works a menial, low paying labor job and in no way can afford an attorney to handle his case.[176] On the other hand, Mother is a native English speaker with some college-level education in the United States. She has a working knowledge of Spanish, but is much more comfortable with English. She has a decent paying job, making just enough to afford legal representation during the divorce proceedings.

During the hotly contested divorce proceedings, the parents are ordered to attend a mediation session to attempt to reach a settlement concerning custody of the children. Mother's attorney recommends a bilingual mediator to both parties, believing that the bilingual mediator could help Father understand the proceedings and facilitate the process. Father agrees with the reasoning of opposing counsel and consents to the bilingual mediator. He feels awarded with a golden opportunity believing

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mediation setting may not be mainstream. *Id.* at 412. These differences, coupled with the complexity of the law, can put a client at risk for not understanding his or her rights. *Id.* In addition to knowledge of general mediation procedures, a successful mediator should "be aware of, and have an appreciation for, each client's personal experience as well as his or her ethnic heritage." *Id.*

171. *See* Tex. Fam. Code Ann. § 6.602(a) (West 2006) (providing permissive authority for a court to refer a divorce case to mediation either on its own volition or at the written request of both parties).

172. *See id.* § 6.406(b) (West 2006) (requiring that divorce trials in Texas include suits for custody of children so long as both parties are recognized at law as the parents of the children and another court does not already have jurisdiction over them); *see also* Seligman-Hargis v. Hargis, 186 S.W.3d 582, 586 (Tex. App.—Dallas 2006, no pet.) (discussing § 6.406(b) of the Texas Family Code, which requires a party seeking a divorce to join its suit affecting parent-child relationship).

173. *See* Isolina Ricci, *Court-Based Mandatory Mediation*, *in* DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 397, 399–400 (Jay Folberg et al. eds., 2004) (describing the potential challenges awaiting mediators in regions with diverse populations).

174. *See id.* at 399 (explaining that in California, the majority of mediation clients are typically not Caucasian).

175. *See id.* (highlighting that almost forty percent of parents in California have a high-school education or lower).

176. *See id.* (stating that one-quarter of parents in California earn less than eight-hundred dollars per month).

he will be able to understand the proceedings. Unfortunately, Father has no clue as to what lies ahead.

A. *Unethical*

Serving in a dual capacity has traditionally been treated similar to a conflict of interest.[177] In fact, performing dual-roles also questions the neutrality[178] and confidentiality of the individual in both the dual-role of an interpreter-mediator, as well as in the individual roles of an interpreter and a mediator.[179]

1. Neutrality

The standards of neutrality for an attorney-mediator come from the ABA's MRPC Rule 2.4, which besides remaining neutral, only requires the attorney to inform unrepresented parties about his participation in the proceedings and that he does not represent them.[180] Model Standard 2 offers the only other guide, providing that the mediator should decline or withdraw from the mediation if he cannot conduct it impartially and free of bias.[181]

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177. *See* Tex. Comm. on Prof'l Ethics, Op. 583, 73 TEX. B.J. 838 (prohibiting a Texas lawyer from serving in a divorce proceeding as both mediator and drafter of the divorce settlement); MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard III. (A) (Am. Arbitration Ass'n, & Ass'n for Conflict Resolution 2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf (mandating that mediators avoid actual or apparent conflicts of interests when performing their duties).

178. Suzanne McCorkle, *The Murky World of Mediation Ethics: Neutrality, Impartiality, and Conflict of Interest in State Codes of Conduct*, 23 CONFLICT RESOL. Q. 165, 171 (2005) ("Although mediation authors differentiate between neutrality . . . and impartiality[.] . . . most codes use the terms interchangeably. Codes also address neutrality implicitly within sections on conflict of interest, dual role relationships, and dual alternative dispute resolution [ ] processes.").

179. *Cf.* Phyllis E. Bernard, *Only Nixon Could Go to China: Third Thoughts on the Uniform Mediation Act*, 85 MARQ. L. REV. 113, 128–29 (2001) (conducting an analysis on forty recent bar opinions that frequently discussed various ethical issues in mediation, including "conflicts of interest, confidentiality, [and] dual roles for attorney-mediator[s]").

180. MODEL RULES OF PROF'L CONDUCT R. 2.4 (2007) (explaining the responsibilities of an attorney performing the role of third-party neutral).

181. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard II. (Am. Arbitration Ass'n, & Ass'n for Conflict Resolution 2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf (discussing the requirements for impartiality of a mediator). In addition, the mediator should not accept payments or gifts. *Id.*

On the other hand, the impartiality standards for interpreters are more restrictive.[182] The interpreter's primary responsibility is to interpret the source language to the target language.[183] The federal standards, in addition to requiring neutrality of interpreters, also prohibit the interpreter from freely conversing with the parties or relatives, except while interpreting.[184] It also prohibits the interpreter from engaging in any activity that could be a conflict of interest.[185] Also, the NAJIT's Canon 2 requires interpreters to "avoid[ ] unnecessary contact with the parties" and commenting on the case.[186]

Initially, it seems the individual impartiality requirements for an attorney-mediator are forgiving in comparison to those of an interpreter.[187]

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182. An interesting observation made while researching interpreters was that at one time interpreters were seen as agents of their employers under the Restatement (Second) of Agency § 14E (1958). But, if both parties hired the interpreter, he was the agent of neither. *Id.* The commentary of the Restatement explains that an interpreter, as an agent, could bind his principal, but if hired jointly by two contracting parties, then any error made by the interpreter in the agreement made between the parties made the transaction fail. *See id.* cmt. a–b. The Restatement Third of Agency makes no mention of an interpreter. *See generally* RESTATEMENT (THIRD) OF AGENCY (2006).

183. *See* ADMIN. OFFICE OF THE U.S. COURTS, STANDARDS OF PERFORMANCE AND PROFESSIONAL RESPONSIBILITY FOR CONTRACT COURT INTERPRETERS IN THE FEDERAL COURTS Standard 2, *available at* http://www.uscourts.gov/uscourts/FederalCourts/Interpreter/Standards_for_Performance.pdf (requiring that interpreters render accurate and complete services while acting as officers of the court); CODE OF ETHICS AND PROF'L RESPONSIBILITIES (Nat'l Ass'n of Judiciary Interpreters and Translators), *reprinted in* MARIANNE MASON, COURTROOM INTERPRETING app. 2, at 107–08 (2008) (promulgating the ethical standards of NAJIT members).

184. ADMIN. OFFICE OF THE U.S. COURTS, STANDARDS OF PERFORMANCE AND PROFESSIONAL RESPONSIBILITY FOR CONTRACT COURT INTERPRETERS IN THE FEDERAL COURTS Standard 3, *available at* http://www.uscourts.gov/uscourts/FederalCourts/Interpreter/Standards_for_Performance.pdf (requiring that interpreters in federal courts neither act nor allow themselves to appear to act impartially in the course of their duties).

185. *Id.* (stating that interpreters must disclose conflicts of interest whether actual or perceived).

186. CODE OF ETHICS AND PROF'L RESPONSIBILITIES Canon 2 (Nat'l Ass'n of Judiciary Interpreters and Translators), *reprinted in* MARIANNE MASON, COURTROOM INTERPRETING app. 2, at 108 (2008) (providing detail as to how an interpreter might avoid being perceived as impartial).

187. *See* MODEL RULES OF PROF'L CONDUCT R. 2.4 (2009) (requiring lawyers to inform the parties involved in the dispute resolution that they are not representing them as clients); MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I(A) (2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf (signifying that a mediator must allow the parties involved in the mediation to come to a decision through self-determination and not coercion from the mediator); CODE OF ETHICS AND PROF'L RESPONSIBILITY Canon 4 (Nat'l Ass'n of Judiciary Interpreters and Translators), *reprinted in* MARIANNE MASON, COURTROOM INTERPRETING app. 2, at 108 (2008) (stating that the rules of ethics for interpreters exist to ensure that non-English speakers have the same access to justice that English speakers have).

But when both roles and their accompanying ethical standards are combined, therein lies an ethical problem with neutrality. First, the interpreter is not to communicate with the parties or their relatives outside of the interpreter role.[188] A mediator's main role is to facilitate communication between the parties, which requires communication outside of the role of an interpreter.[189] When it is perceived an interpreter communicates with individuals outside of the strict scope of interpreting, there can be serious questions raised regarding his impartiality.[190]

One party may also perceive a bias when the interpreter has to interpret crude comments directed from one party to another, or continuous exchanges with a party may be construed as personal conversation between the mediator and the non-English speaking party.[191] For example, written Spanish is up to thirty percent longer than English.[192] One would then assume that when interpreting from Spanish to English, the English version would be shorter.[193] In fact, the interpreted English version ends up being "longer than the original Spanish testimony."[194] A Spanish-speaking party may assume the longer interpretation was actually a combination of the interpreted message and personal conversation.[195]

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188. CODE OF ETHICS AND PROF'L RESPONSIBILITY Canon 2 (Nat'l Ass'n of Judiciary Interpreters and Translators), *reprinted in* MARIANNE MASON, COURTROOM INTERPRETING app. 2, 108 (2008) (decreeing that interpreters must be neutral and avoid communication with the parties outside of the proceedings). An interpreter may not give advice during the proceedings because this could be seen as practicing law. *Id.*

189. KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 51 (3rd ed. 2004) (requiring the mediator to channel the communication in a positive way). A mediator needs to use communication to resolve the conflict that faulty communication created. *Id.*

190. *See* State v. Pacheco, 155 P.3d 745, 749–50 (N.M. 2007) (stating that an interpreter's presence during jury deliberations can create prejudice that can possibly be rebutted). In this case, the interpreter was allowed to enter the jury deliberation room, raising a question of the impartiality of the jury. *Id.* at 747. New Mexico allows for non-English speaking jurors and allows interpreters to assist them during deliberations. *Id.* at 749. The court followed its precedent, holding that an interpreter present during deliberations was not sufficient to give rise to a presumption of prejudice. *Id.* at 750. The court did impose a duty on district courts to give additional instructions to interpreters prior to entering the jury's deliberations. *Id.* at 755; *see also* United States v. Dempsey, 830 F.2d 1084, 1091 (10th Cir. 1987); People v. DeArmas, 483 N.Y.S.2d 121, 123 (N.Y. App. Div. 1984).

191. *See* Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 45 (1997) (requiring the mediator and interpreter to remain neutral in the mediation).

192. SUSAN BERG-SELIGSON, THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS 120 (1st ed. 1990) (highlighting the fact that one-word English expressions normally need at least two Spanish words).

193. *Id.* at 122.

194. *Id.*

195. *Id.* at 142 (explaining that jurors should perceive the longer interpretation as being favorable to the source of the testimony, but in fact the opposite is true). For a more

Canon 2 of the NAJIT's also requires an interpreter not to comment on the case.[196] In the court setting, potential hearsay implications can be raised when an interpreter discusses the case with other individuals outside of the interpretation setting.[197] Also, interpreter's comments on the word choice in an interpretation have been called into question in at least one federal case.[198]

One particular mediation style, evaluative mediation, demonstrates the danger of the combining the roles.[199] Evaluative mediation allows the mediator to "introduc[e] a third-party view over the merits of the case or of particular issues between the parties."[200] Evaluative mediation is much more of an adjudicative mode, similar to litigation.[201] Interpreters are important in adjudicative contexts because "a greater degree of accuracy and verisimilitude will be required from the interpreter because life, liberty or property are directly at stake, as they are with criminal and civil litigation."[202] That "third-party view" is most likely what the NAJIT's drafters attempted to curtail, because it would affect the interpreter's duty of impartiality.[203]

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thorough analysis of the interaction between pragmatics and the lengthening of testimony, see *id.* at 119–45.

196. CODE OF ETHICS AND PROF'L RESPONSIBILITY Canon 2 (Nat'l Ass'n of Judiciary Interpreters and Translators), *reprinted in* MARIANNE MASON, COURTROOM INTERPRETING app. 2, 10 (2008); *see also* Angela McCaffrey, *Don't Get Lost in Translation: Teaching Law Students to Work With Language Interpreters*, 6 CLINICAL L. REV. 347, 370 (2000) (explaining the Minnesota code for interpreters prohibits interpreters from giving individuals advice). Minnesota's Code of Professional Responsibility for Interpreters is based on the National Center for State Courts' Model Code. Angela McCaffrey, *Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters*, 6 CLINICAL L. REV. 370 (2000).

197. *See* Saavedra v. State, 297 S.W.3d 342, 343–44 (Tex. Crim. App. 2009).

198. *See, e.g.*, United States v. Gonzalez, 319 F.3d 291, 296 (7th Cir. 2003) (holding that the district court's refusal to inform the jury about an interpreter's comments on the interpretation was not an abuse of discretion).

199. Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 50–51 (1997).

200. Jordan Hellman, Note, *Racing for the Arctic?: Better Bring a Flag*, 10 CARDOZO J. CONFLICT RESOL. 627, 641 (2009) (quoting KARL MACKIE ET AL., THE ADR PRACTICE GUIDE: COMMERCIAL DISPUTE RESOLUTION 11 (2d. ed. 2000)) (internal quotations omitted).

201. *See* Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 51 (1997) (stipulating that the adjudicative mode of dispute resolution should follow more guidelines during their proceedings due to the possibility of appeal).

202. *Id.*

203. *See* CODE OF ETHICS AND PROFESSIONAL RESPONSIBILITY Canon 2, *reprinted in* MARIANNE MASON, COURTROOM INTERPRETING app. 2, 108 (2008) (stating that interpreters may not comment on cases and must remain impartial during proceedings).

2. Confidentiality

a. Comparison of the Confidentiality Standards

A requirement of confidentiality is explicit for both court interpreters and mediators,[204] but for interpreters, the requirement is fairly broad in scope.[205] The federal provisions for interpreter confidentiality simply state: "Interpreters shall protect the confidentiality of all privileged and other confidential information."[206] The state provisions, often similar to the NAJIT's Code of Ethics and Professional Responsibility, require "[p]rivileged or confidential information acquired in the course of interpreting or preparing a translation shall not be disclosed by the interpreter or translator without authorization."[207] The federal standards do not mention an exception to the standard, while the states seem to afford an exception to disclosure, but only with authorization.[208] The NAJIT is silent as to who can give said authorization, leaving one to wonder if the court, the speaker, or the defendant can give authorization to allow disclosure.[209]

It seems that the only information that an interpreter must keep confidential comes from interpreting communications between an attorney

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204. *E.g.*, Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 B.Y.U. L. REV. 715, 722–27 (1997); ADMIN. OFFICE OF THE U.S. COURTS STANDARD FOR PERFORMANCE AND PROFESSIONAL RESPONSIBILITY FOR CONTRACT COURT INTERPRETERS IN THE FEDERAL COURTS Standard 5, *available at* http://www.uscourts.gov/uscourts/FederalCourts/Interpreter/Standards_for_Performance.pdf; CODE OF ETHICS AND PROF'L RESPONSIBILITY, Canon 3 (Nat'l Ass'n of Judiciary Interpreters and Translators), *reprinted in* MARIANNE MASON, COURTROOM INTERPRETING app. 2, at 107–09 (2008).

205. See discussion in Section III.A.2 of this Article for the confidentiality standards of a mediator and Section III.B for those of an interpreter.

206. ADMIN. OFFICE OF THE U.S. COURTS STANDARD FOR PERFORMANCE AND PROFESSIONAL RESPONSIBILITY FOR CONTRACT COURT INTERPRETERS IN THE FEDERAL COURTS Standard 5, *available at* http://www.uscourts.gov/uscourts/FederalCourts/Interpreter/Standards_for_Performance.pdf.

207. CODE OF ETHICS AND PROF'L RESPONSIBILITY Canon 3 (Nat'l Ass'n of Judiciary Interpreters and Translators), *reprinted in* MARIANNE MASON, COURTROOM INTERPRETING app. 2 at 108 (2008).

208. STANDARD FOR PERFORMANCE AND PROFESSIONAL RESPONSIBILITY FOR CONTRACT COURT INTERPRETERS IN THE FEDERAL COURTS 2, *available at* http://www.uscourts.gov/uscourts/FederalCourts/Interpreter/Standards_for_Performance.pdf; CODE OF ETHICS AND PROF'L RESPONSIBILITY Canon 3 (Nat'l Ass'n of Judiciary Interpreters and Translators), *reprinted in* MARIANNE MASON, COURTROOM INTERPRETING app. 2, at 108 (2008).

209. CODE OF ETHICS AND PROF'L RESPONSIBILITY Canon 3 (Nat'l Ass'n of Judiciary Interpreters and Translators), *reprinted in* MARIANNE MASON, COURTROOM INTERPRETING app. 2, at 108 (2008).

and his client. Communications made to interpreters between an attorney and a client are often considered confidential under the attorney-client privilege,[210] or as an exception to the third-party disclosure rule, which normally waives the privilege.[211] For instance, Connecticut statutory law forbids disclosure of confidential information by an interpreter, unless the holder of the privilege waives the privilege.[212] One experienced interpreter believes the duty of confidentiality for information covered by privilege may be ambiguous or a "gray area" for interpreters.[213] He even goes so far as to ask whether an interpreter should know what privilege and privileged information is, and how an interpreter would find this out.[214]

The confidentiality standards for attorney-mediators are much more defined, but vary largely throughout various jurisdictions.[215] In civil cases, Federal Rule of Evidence 408 excludes evidence of settlement negotiations,[216] but state law on compromise discussions generally controls.[217] Additionally, the Texas ADR Act has statutorily created strict confidentiality of communications in mediation proceedings.[218] Section 154.053 of the Texas Civil Practice and Remedies Code requires all parties to keep all matters confidential,[219] and in the case of a bilingual mediator serving in a dual capacity, overlaps the confidentiality requirement for interpreters.[220] Contrary to that of interpreters, confidentiality in criminal cases is rooted in either the plea discussion exclusion of Federal Rule of Evidence 410[221] or statutory and judicially created privileges.[222]

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210. *E.g.*, United States v. Salamanca, 244 F. Supp. 2d 1023, 1025 (D.S.D. 2003); People v. Alvarez, 926 P.2d 365, 415 (Cal. 1996).

211. Delta Fin. Corp. v. Morrison, 820 N.Y.S.2d 745, 748 (N.Y. Sup. Ct. 2006).

212. CONN. GEN. STAT. ANN.§ 52-146l (West 2009).

213. Bruno G. Romero, *Here Are Your Right Hands: Exploring Interpreter Qualifications*, 34 U. DAYTON L. REV. 15, 26 (2008).

214. *Id.*

215. *See* SARAH R. COLE ET AL., MEDIATION: LAW, POLICY & PRACTICE § 9:3 (2nd ed. 2010).

216. FED. R. EVID. 408(a)(2).

217. *See* SARAH R. COLE ET AL., MEDIATION: LAW, POLICY & PRACTICE § 9:3 (2nd ed. 2010).

218. *See* L. Wayne Scott, *The Law of Mediation in Texas*, 37 ST. MARY'S L.J. 325, 393–405 (2006) (analyzing the confidentiality requirements for mediation in Texas law).

219. *See* TEX. CIV. PRAC. & REM. CODE § 154.053(c) (West 2005).

220. The requirements of confidentiality for the role of a mediator may be defeated by other implications, but leaves questions regarding the confidentiality standard for interpreters. See Discussion in Section IV.A.2.a of this Article regarding the comparison of the different confidentiality standards for each role and the hypothetical example in Section IV.A.2.b.

221. FED. R. EVID. 410.

222. *See* 1 SARAH R. COLE ET AL., MEDIATION: LAW, POLICY & PRACTICE §§ 9:9, 9:10–9:17 (2d ed. 2010) (discussing evidentiary exclusions and privileges respectively).

The Model Standards require that all information attained during the mediation must remain confidential, unless agreement or law permits disclosure.[223] A mediator is not to discuss a participant's demeanor during the session with non-involved parties and is only authorized to report whether a settlement was reached and if the parties attended the mediation session, and even then, only if required to do so.[224]

There are generally two exceptions regarding mediator disclosure of confidential information obtained during mediation: a duty to report crime[225] and a duty to protect from harm.[226] The New Jersey Advisory Committee on Professional Ethics, appointed by the New Jersey Supreme Court, stated in a 1982 opinion that "an attorney-mediator should [not] be required by ethical considerations to disclose information which non-attorney mediators may keep confidential."[227] They adopted a modern approach in a 1994 opinion, acknowledging that when a lawyer "serves as a third party neutral, he or she is acting as a lawyer and is not engaging in a separate business."[228]

The ABA's MRPC generally require attorneys to maintain confidentiality of information for former, current, and potential future clients.[229] Rule 1.6(b)(1), (2), and (6) allow the lawyer to reveal confidential information similar to a mediator.[230] However, Rule 2.4 provides different standards for an attorney acting as a third-party neutral, and Comment 3 expressly acknowledges the potential conflicting standards between an attorney and a mediator.[231] The ABA does require that a lawyer report the misconduct of another lawyer even when "completely removed from the

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223. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard V (Am. Arbitration Ass'n & Ass'n for Conflict Resolution 2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

224. *Id.*

225. *See* 1 SARAH R. COLE ET AL., MEDIATION: LAW, POLICY & PRACTICE § 9:30 (2d ed. 2010) (providing examples of jurisdictions that require mediators to make certain reports despite the confidentiality requirement). The crimes included that trigger disclosure include: child abuse, commission of a felony, gun injuries, and neglect. *Id.* at 9–78, 9–79. California also requires mediators "to report settlements for wrongful discharge and possibly for grand jury proceedings. *Id.* at 9–79.

226. 1 SARAH R. COLE ET AL., MEDIATION: LAW, POLICY & PRACTICE § 9:31 (2d ed. 2010).

227. N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Formal Op. 494 (1982), 1982 WL 117852.

228. N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Formal Op. 676 (1994), 1994 WL 129923.

229. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6, 1.9, 1.18 (2009) (discussing confidentiality in the context of clients—prospective, current, and former).

230. *Id.* at R. 1.6(b)(1)–(2), (6).

231. *See id.* at R 2.4 cmt. [3] (examining the possible conflicts for lawyers as third-party neutrals compared to non-lawyer third-party neutrals).

practice of law,"[232] which may include a strictly third-party neutral ADR practice. The mediator's duty to report attorney misconduct is a controversial issue.[233] Interestingly enough, the ABA has not felt it necessary to address "whether a lawyer should be held to a different standard of behavior than other persons serving as mediator."[234]

b. The Dual-Role in a Hypothetical Situation

Returning to the ultimate issue, a dual-role bilingual attorney-mediator may potentially have confidentiality problems when overlapping the duties of an interpreter and of a mediator. An interpreter seemingly is only required to maintain confidential conversations protected between an attorney and a client under the attorney-client privilege,[235] and they are not considered third-party disclosures.[236] The attorney-mediator's duty of confidentiality initially seems all-encompassing, but various exceptions and laws provide for disclosure.[237] When both of the roles are combined, ethical issues will likely arise.

An analysis is provided demonstrating the complex maze of confidentiality using the hypothetical situation posed above to demonstrate the complexity of the confidentiality requirements between the roles, both individually and combined. Using the Texas law on confidentiality in ADR[238] and interpretation[239] and the situation above, presume Mother's

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232. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-433 (2004).

233. *See* Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 B.Y.U. L. REV. 715, 747–53 (1997) (attempting to reconcile the mediator's duty of confidentiality with an attorney's duty to report misconduct).

234. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-439 n.19 (2006).

235. *See e.g.*, United States v. Salamanca, 244 F. Supp. 2d 1023, 1025 (D.S.D. 2003) (stating that a relationship of confidentiality will be implied in law between an interpreter and client); People v. Alvarez, 926 P.2d 365, 415 (Cal. 1996) (finding it improper under the California Standards of Judicial Administration for an interpreter to reveal privileged information communicated to them).

236. Delta Fin. Corp. v. Morrison, 820 N.Y.S.2d 745, 748 (N.Y. Sup. Ct. 2006) (recognizing interpreters as a "commonly-recognized exception" and thus do not waive attorney client privilege as a third-party disclosure).

237. See Discussion in Section IV(a)(2)(a) of this Article: Confidentiality, Comparison of the Confidentiality Standards.

238. *See* L. Wayne Scott, *The Law of Mediation in Texas*, 37 ST. MARY'S L.J. 325, 393–09 (2006) (discussing the confidentiality of mediation in Texas).

239. 16 TEX. ADMIN. CODE § 80.100 (2009) (Tex. Dep't of Licensing & Reg., Code of Ethics and Professional Responsibility) (setting forth the rules and ethical guidelines for interpreters who provide services to the judiciary). In the hypothetical posed above, the mediation was a result of a court order under the TEX. FAM. CODE ANN. § 153.0071 (West 2008).

attorney and Mother made false statements to Father during the joint mediation session. Here, the Texas ADR act provides that the proceedings are confidential.[240] In heroically fulfilling the role of interpreter, Bilingual Mediator also made false statements to Father by accurately interpreting everything said during the proceedings.[241] Bilingual Mediator eventually learned of the misconduct during a private caucus, and realized that he too has been lying under the guise of a different language. Because the information was obtained as a result of a private caucus, that information is to be kept confidential by Bilingual Mediator from Father.[242] Also, Bilingual Mediator's duty as interpreter requires him to keep the information acquired during private caucus confidential.[243] But now, because Bilingual Mediator is also an attorney, under the MRPC, he is obligated to report Mother's Attorney's misconduct.[244]

However, Texas Civil Practice and Remedies Code § 154.053 forbids the disclosure of the confidential information, absent an agreement with the disclosing party or all parties, and Bilingual Mediator cannot disclose the demeanor and conduct of the parties and their counsel.[245] Thus, Bilingual Mediator must and would get approval from Father to disclose the mediation proceedings, but it is likely the Mother and her attorney would decline—the guilty parties who actually revealed the relevant information during private caucus. In this case, an agreement allowing disclosure from all the participating parties is virtually guaranteed to be impossible. Even stricter, § 154.073 states a communication made during an ADR procedure is confidential and cannot be disclosed or used as evidence against the participant.[246]

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240. TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(b) (West 2005); L. Wayne Scott, *The Law of Mediation in Texas*, 37 ST. MARY'S L.J. 325, 393–94 (2006).

241. *See* CODE OF ETHICS AND PROF'L RESPONSIBILITY Canon 1 (Nat'l Ass'n of Judiciary Interpreters and Translators), *reprinted in* MARIANNE MASON, COURTROOM INTERPRETING app. 2, at 107–08 (2008) (listing the rules of professional conduct applying to interpreters).

242. TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(b) (West 2005); L. Wayne Scott, *The Law of Mediation in Texas*, 37 ST. MARY'S L.J. 325, 394 (2006).

243. *See* CODE OF ETHICS AND PROF'L RESPONSIBILITY Canon 3 (Nat'l Ass'n of Judiciary Interpreters and Translators), *reprinted in* MARIANNE MASON, COURTROOM INTERPRETING app. 2, at 108 (2008) (stating the rules of confidentiality applicable to interpreters).

244. MODEL RULES ON PROF'L CONDUCT R. 8.3(a) (2009).

245. TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(b) (West 2005).

246. *Id.* § 154.073. There are very few exceptions allowed under the statute as to what exactly can be disclosed. *See, e.g., id.* § 154.073(f). *But see, e.g., Alford v. Bryant*, 137 S.W.3d 916, 922 (Tex. App.—Dallas 2004, pet. denied) (avoiding the clash of §§ 154.053 and 154.073 by finding the privilege of confidentiality was waived); Avary v. Bank of Am. 72 S.W.3d 779, 794–95 (Tex. App.—Dallas 2002, pet. denied) (finding the provisions of § 154.073 do not trigger a duty of confidentiality when the subject matter does not relate to

Some of the confidentiality issues in ADR have already been answered by the controversial decision issued by the Texas Court of Appeals in Dallas.[247] *Alford v. Bryant*[248] was a legal malpractice case where the client sued his attorney for failing to make disclosures in a case, and the client's attorney attempted to have the mediator testify.[249] The Court of Appeals created a judicial exception to the strict confidentiality requirements of §§ 154.053 and 154.073 by holding the confidentiality privilege was waived when used offensively.[250]

But what about the duty of confidentiality required in the role of the interpreter? The Code of Ethics and Professional Responsibility for court interpreters in Texas states that interpreters cannot disclose confidential information "unless authorized by the Court or by law."[251] Here, the court, similar to *Alford*, may again have to apply the offensive use doctrine to allow the interpreter to disclose the information[252] or create some other judicial exception to this fact-specific, complex situation.

B. *Inefficient*

1. Unfamiliarity with the Complexity of Interpretation

"Few legal practitioners, either on the bench or in the bar, fully understand the complexities of courtroom interpretation or realize the significant skills necessary for interpreter competence."[253] Federal Rule of Evidence 604 requires the interpreter to meet the qualifications of an expert in the field of interpretation, something a bilingual does not meet per

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or arise out of the subject of dispute); L. Wayne Scott, *The Law of Mediation in Texas*, 37 ST. MARY'S L.J. 325, 394–95 (2006).

247. Alford v. Bryant, 137 S.W.3d 916 (Tex. App.—Dallas 2004, pet. denied).

248. *Id.*

249. *Id.* at 919.

250. *Id.* at 921–22.

251. 16 TEX. ADMIN. CODE § 80.100(g) (2009) (Tex. Dep't of Licensing & Reg., Code of Ethics and Professional Responsibility). Regarding the hypothetical, there may be some argument as to whether the bilingual mediator is solely mediating under court order, or if he is also interpreting as a service to the judiciary because of the court ordered mediation. *Cf.* Veloz v. State, No. 03-06-00499-CR, 2007 WL 2010802, at *9 & n.3 (Tex. App.—Austin 2007, no pet.) (mem. op.) (comparing and contrasting when an interpreter is acting under the authority of the judiciary, and different rules of confidentiality apply, versus in a consultant capacity, in this case with the district attorney's office where the rules of confidentiality are more relaxed).

252. 16 TEX. ADMIN. CODE § 80.100(g) (2009) (Tex. Dep't of Licensing & Reg., Code of Ethics and Professional Responsibility).

253. Cassandra L. McKeown & Michael G. Miller, *Say What?: South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. REV. 33, 39–40 (2009).

se.[254] Not only is interpretation an art, but it is also a science.[255] An interpreter must have near native proficiency in both languages,[256] and a bilingual may not.[257] The interpreters must also master both cultures, particularly because "language is a metaphor for cultural and personal experience" and the "heart within the body of culture."[258] An interpreter's training allows him to conduct various methods of interpretation: some suitable for certain situations, and others not so suitable.[259]

a. Language

As stated above, "an interpreter should [be a] true bilingual."[260] In essence, a courtroom interpreter is not only converting from one language to another, but in addition, nonstandard language, as well.[261] Nonstandard language includes dialects, code switching (also known as language switching), language contact, deceptive cognates, jargon, and geographic variation.[262] In the legal context, the interpreter must have an advanced knowledge of legal concepts and terminology in both languages.[263] Legal language is practically its own dialect.[264]

There is a tremendous distinction between "normal" English and legal English, also known as "legalese," of which a lay bilingual will have limited knowledge.[265] "[L]egalese is an integral part of the American legal

254. *See* FED. R. EVID. 604; ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 7 (1992).

255. Joshua Karton, *Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony*, 41 VAND. J. TRANSNAT'L L. 1, 26 (2008) (stating that interpretation is "as much an art as it is a science").

256. Cassandra L. McKeown & Michael G. Miller, *Say What?: South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. REV. 33, 40 (2009).

257. *See* ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 64 (1992) (discussing the range of proficiencies covered by the bilingual label compared to the requisite proficiency necessary for interpreters).

258. *Id.* at 59 (internal quotations omitted).

259. *See* Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 15–18 (1997) (reviewing different techniques used for interpreting).

260. *See* ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 64 (1992).

261. *See id.* at 67–86 (Chapter 5—Interpreting Nonstandard Language).

262. *See id.*

263. Cassandra L. McKeown & Michael G. Miller, *Say What?: South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. REV. 33, 40 (2009).

264. ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 115 (1992).

265. *See* SUSAN BERK-SELIGSON, THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS 18–19 (1st ed. 1990) (recognizing the distinction between a bilingual individual and one with the added understanding of "legalese").

system," and it exists both in written and spoken forms.[266] Legalese encompasses a variety of characteristics, far from common English, such as: archaisms, complex vocabulary, terms of art, Latin terms, and uncommon syntactic constructions.[267]

Some individuals argue that the use of legalese can be avoided by using simpler language to facilitate the interpretation.[268] In fact, one of the benefits of mediation is that it is a more informal, friendly environment, making it a practical solution to avoid the use of adversarial legalese.[269] Many advocates for the use of mediation advise mediators to stay away from using legalese.[270] The truth of the matter is some concepts are best explained with legal terms, regardless of the setting.[271]

For example, in a mediation session to settle a personal injury case the term "tort" will likely be a main concept discussed at length during the proceeding. If one of the parties is from Mexico and a native Spanish speaker, translating the term will be especially difficult.[272] The term "tort" has no direct translation into the Spanish language,[273] and in fact does not directly exist in Mexican law.[274] In the hypothetical family law

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266. *Id.* at 15, 18–20.

267. ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 115 (1992).

268. *See* Angela McCaffrey, *Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters*, 6 CLINICAL L. REV. 347, 355 (2000).

269. *See* Orna Rabinovich-Einy, *Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 HARV. NEGOT. L. REV. 253, 265 (2006) (explaining the inherent benefit of mediation due to its less adversarial nature); Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 53, 75 (1997) (reviewing benefits of mediation not present in an adjudication).

270. *See* Geetha Ravindra, *When Mediation Becomes the Unauthorized Practice of Law*, 15 ALTERNATIVES TO HIGH COST. LITIG. 94, 106 (1997).

271. *Cf.* ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 116 (1992) (pointing to an attorney using formal legal language to discuss instructions for the deliberations, and how a more colloquial variety of English may be used by that same attorney in a closing statement in order to better relate to jurors).

272. *See* Linda Karr O'Connor, *Best Legal Reference Books of 1993*, 86 LAW LIBR. J. 219, 231 (1994) (reviewing comparatively Spanish-English legal dictionaries).

273. *Id.*

274. *See* Jorge A. Vargas, *Mexican Law and Personal Injury Cases: An Increasingly Prominent Area for U.S. Legal Practitioners and Judges*, 8 SAN DIEGO INT'L L.J. 475, 487 (2007) (noting there is not direct equivalent of the word "tort" in Mexican law). The word "tort" translates to "*agravio*" in Spanish. LOUIS A. ROBB, DICTIONARY OF LEGAL TERMS: SPANISH-ENGLISH & ENGLISH-SPANISH 220 (2007). *Agravio* defined in a Mexican legal dictionary, written in Spanish, is an "injury—damages—caused by a judgment, judicial or administrative, by the unlawful application of a legal rule or by failure to apply the correct rule that controls the case, susceptible to challenge on the basis of that rule." *See* RAFAEL DE PINA & RAFAEL DE PINA VARA, DICCIONARIO DE DERECHO 67 (30th ed., 2007) (translation by the author).

case of Father and Mother, the mediator may have a tough time explaining American family law legal concepts to a Father familiar only with the family law of Mexico.[275]

b. Culture

Professional interpreters are also aware that different languages come complete with different cultures.[276] "[F]actors such as dialect, educational level, register, specialized terms, style, and nonverbal cues" all influence the interpretation.[277] Mediators, as third-party neutral facilitative negotiators, are trained to identify primarily only cultural differences between the parties that could lead to an impasse.[278] Recently, there has been a shift in focus to train negotiators and mediators to be more culturally aware in order to achieve better results in settling cases,[279] but interpreters must master the art of "biculturalism" to succeed in their profession.[280]

c. Methods

The two most common methods used in legal interpretation are simultaneous and consecutive interpretation,[281] and sometimes a hybridized version of the two, known as semi-consecutive interpretation.[282] Consecutive interpretation tends to be more accurate, and it allows the inter-

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275. *See* Jorge A. Vargas, *Family Law in Mexico: A Detailed Look into Marriage and Divorce*, 9 SW. J.L. & TRADE AM. 5, 9 (2002) (analyzing Mexican family law legal issues of divorce and marriage, which may apply to a bi-national marriage).

276. *See* ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 53–66 (1992) (discussing the inextricability of language from culture, thus explaining the need to have an understanding of both when working with individuals from different cultures and legal systems).

277. *Id.* at 53.

278. *See* Harold Abramson, *Outward Bound to Other Cultures: Seven Guidelines for U.S. Dispute Resolution Trainers*, 9 PEPP. DISP. RESOL. L.J. 437, 454 (2009) (explaining one training process used to educate cross-cultural negotiators).

279. *See id.* at 443–47 (restricting exploration of cultural differences between individuals to those that may cause a deadlock, instead of seeking a deeper cultural understanding of both parties).

280. *See* ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 59 (1992) ("Biculturalism entails the ability to interpret experiences in the manner appropriate to both cultures involved.").

281. Cassandra L. McKeown & Michael G. Miller, *Say What?: South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. REV. 33, 38 (2009); Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 13 (1997).

282. MARIANNE MASON, COURTROOM INTERPRETING 48–49 (2008).

preter to listen to the entire message and digest it before interpreting.[283] It also allows observers to see the speaker's tone, style, demeanor, and nonverbal cues.[284] However, consecutive interpretation does require the message to be spoken twice, once in each language, thus substantially prolonging the overall time for communication.[285] While it is the preferred mode in interpreting witness testimony,[286] depending on the circumstances, an interpreter may decide that the time versus accuracy tradeoff is worthwhile and utilize simultaneous interpretation.[287]

Alternatively, simultaneous interpreting is faster, but removes the focus from the speaker, and is not as accurate as consecutive interpretation.[288] Thus, it is typically reserved for a speaker requiring a longer period of time to speak.[289] The hybrid semi-consecutive interpretation allows the interpreter to interpret a speaker's segmented speech.[290] The speaker does not have to finish their entire speech in order for the interpreter to do her job.[291] It does not affect the source language very much, shortens the total interpretation time, and most importantly, reduces omissions when compared to consecutive interpretation.[292]

Ideally, in a mediation where an interpreter is present, most mediators would prefer consecutive or semi-consecutive interpretation for its accuracy in order to achieve a resolution between the parties.[293] However, in this day and age where time is money, simultaneous interpretation would

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283. Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 15 (1997).

284. *Id.* at 16.

285. *Id.* at 15.

286. Cassandra L. McKeown & Michael G. Miller, *Say What?: South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. REV. 33, 38 (2009).

287. Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 15 (1997).

288. *See id.* (highlighting the fact that by using simultaneous interpretation, the interpreter must necessarily talk over the speaker to interpret, which can distract from the speaker).

289. *See* Cassandra L. McKeown & Michael G. Miller, *Say What?: South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. REV. 33, 39 (2009) (using jury instructions as an example of one time simultaneous interpretations is often used due to the length of the instructions).

290. MARIANNE MASON, COURTROOM INTERPRETING 48–49 (2008).

291. *Id.* at 49.

292. *See id.* at 58–59 (2008) (measuring the increase in efficiency when an interpreter employs consecutive interpretation as a technique).

293. *See* Alejandro V. Cortes, Note, *The H-2A Farmworker: The Latest Incarnation of the Judicially Handicapped and Why the Use of Mediation to Resolve Employment Disputes Will Improve Their Rights*, 21 OHIO ST. J. ON DISP. RESOL. 409, 429 n.135 (2006) (highlighting the positives and draw backs of different interpretation techniques).

likely get the job done faster.[294] Either would be suitable when a separate qualified or certified interpreter is present.[295]

This returns the focus to the important issue of a dual-role bilingual mediator. It is impracticable and unethical for a bilingual mediator to engage in simultaneous interpretation and mediate at the same time.[296] He or she would essentially be listening for both roles at the exact same time: active listening in the role of the mediator[297] and "active concentrated listening" in the role of an interpreter.[298] Surely at least one role, if not both, would severely be impacted by his lack of concentration or by interpreter fatigue, discussed earlier in this Article.[299]

The dual-role mediator has only three alternatives left: consecutive, semi-consecutive, or summary interpretation. As previously mentioned, summary interpretation is not suitable for legal interpretation,[300] and likely demonstrates a lack of familiarity and skill in interpreting.[301] "Summary interpretation involves paraphrasing and condensing the original speaker's statements and does not provide a precise rendering of the complete message," all requisite characteristics, standards, and techniques of faithful and true interpretation.[302]

Regardless of the interpretation method elected by the dual-role bilingual mediator, all of the remaining methods of interpretation require active listening similar to simultaneous interpreting, leading to the same

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294. Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 15 (1997).

295. *Id.* at 18.

296. *See id.* at 23.

297. *Cf.* Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295, 327 (2006) (recognizing that active listening is a difficult communication issue mediators face).

298. ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 32–33 (1992). Active concentrated listening requires the interpreter to "concentrate, when listening to the source language message; comprehend the meaning of the source language message in context by going beyond the literal meaning; and formulate and express the message accurately and completely in the target language." *Id.* at 33 (emphasis omitted).

299. *See* Part III.B.3. of this Article.

300. Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 13 (1997).

301. *See* Bruno G. Romero, *Here Are Your Right Hands: Exploring Interpreter Qualifications*, 34 U. DAYTON L. REV. 15, 26–27 (2008) (discussing the debate as to summary interpretation existence as a mode of interpretation and its flaws); *see also* ARLENE M. KELLY, NAT'L ASS'N OF JUDICIARY INTERPRETERS & TRANSLATORS, NAJIT POSITION PAPER: SUMMARY INTERPRETING IN LEGAL SETTINGS (2005), *available at* http://www.najit.org/documents/SummaryInterpreting200609.pdf.

302. Bruno G. Romero, *Here Are Your Right Hands: Exploring Interpreter Qualifications*, 34 U. DAYTON L. REV. 15, 26–27 (2008).

problems with listening and interpreter fatigue discussed throughout this Article.[303]

2. Interpreter Fatigue

Perhaps the biggest drawback to employing a dual-role mediator is the fact that interpreter fatigue will severely diminish not only the effectiveness of interpretation, but more importantly, that of the mediation session.[304] If the bilingual mediator chooses to interpret the mediation session, his concentration will be divided between two very demanding cognitive functions: interpreting and mediating.[305] Research has shown that interpreters employ twenty-two different cognitive skills while interpreting.[306]

Interpreter fatigue occurs in the courtroom due to a variety of factors, mainly the long work periods without a break.[307] According to an empirical study, as the interpretation period approaches thirty minutes, the amount of errors in the interpretation increases substantially, and even more so approaching sixty minutes.[308] Conference interpreters, such as those at the United Nations, are not allowed to engage in simultaneous interpretation for more than thirty minutes.[309] Unfortunately, court in-

303. *See* ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 32–33 (1992) (comparing and contrasting listening versus hearing and their importance to an interpreter); *cf.* Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295, 327 (2006) (highlighting "difficult communication issues" including active listening).

304. *See* Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 15–16 (1997) (explaining the propriety of simultaneous versus consecutive modes of interpretation in mediation and concluding that having an interpreter present in mediation should be required).

305. *See id.* at 23 (listing reasons a bilingual mediator "should not serve as [an] interpreter"); *cf.* Bill Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M. L. REV. 1, 8–16 (1990) (discussing the problematic issues behind an bilingual attorney serving a dual-role, both as counsel and interpreter).

306. Cassandra L. McKeown & Michael G. Miller, *Say What?: South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. REV. 33, 48–49 (2009).

307. MARIANNE MASON, COURTROOM INTERPRETING 8 (2009).

308. *Id.* at 8–9; *see* Cassandra L. McKeown & Michael G. Miller, *Say What?: South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. REV. 33, 49 (2009) (suggesting the threshold for a dramatic increase in interpreter errors is only twenty minutes, compared to other findings indicating thirty minutes as the relevant time). For a complete empirical analysis on the effects of interpreter fatigue on courtroom interpreters, see generally MARIANNE MASON, COURTROOM INTERPRETING (2008).

309. Joshua Karton, *Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony*, 41 VAND. J. TRANSNAT'L L. 1, 30 (2008); Cassandra L. McKeown & Michael G. Miller, *Say What?: South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. REV. 33, 49 (2009).

terpreters do not always work in teams,[310] as conference interpreters tend to do.[311] This essentially denies them the ability to relax and recover their cognitive abilities in order to interpret efficiently and correctly.[312]

To put interpreter fatigue into perspective, there is a practical training exercise done by interpreters that replicates simultaneous interpretation, and it does not necessarily require the knowledge of two languages.[313] "Shadowing" is a listening technique where the individual listens to a source message in one language, and with a brief pause,[314] repeats the same source message they heard and in the same language.[315] This exercise can easily be done while watching a television show, listening to an orator, or even mimicking casual conversation.[316] Mental fatigue most likely will quickly set in within a few minutes for an individual unfamiliar to the exercise.[317] When shadowing can be completed for longer periods of time with no difficulties, it is typically at this point in time when bilingual individuals can begin converting the message from the source lan-

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310. *See* State v. Pacheco, 155 P.3d 745, 759 (N.M. 2007) (setting out standards all courts should adhere to in providing court interpreters to non-English speaking jurors and recommending that interpreters work in teams).

311. ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 52 (1992). United Nations interpreters, often perceived to be the best of the best in interpretation, work in teams. They develop a relationship with each other, and are able to determine and adapt to each other's style, allowing them the ability to back each other up with reference materials and breaks. *See id.*

312. MARIANNE MASON, COURTROOM INTERPRETING 8 (2008); Diana K. Cochrane, Note, *¿Como Se Dice, <Necesito A Un Intérprete>?: The Civil Litigant's Right to a Court-Appointed Interpreter in Texas*, 12 SCHOLAR 47, 74–75 (2009).

313. ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 48 (1992).

314. *Cf., e.g.*, Joshua Karton, *Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony*, 41 VAND. J. TRANSNAT'L L. 1, 31 (2008) (stating that the lag between the source of the dialogue and the interpreter translating the statements is called the *décalage*, French for "time gap," that even the most experienced interpreters experience in listening to the message and interpreting it between the two languages).

315. ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 48 (1992).

316. *See id.* (recommending various monologues especially useful for practicing shadowing).

317. *See id.* By requiring practice, it is implied shadowing is not an easy skill to learn, despite the fact shadowing is performed using the same language. It is reasonable to assume that if professional interpreters experience mental fatigue after twenty to thirty minutes of interpreting, which is not as demanding as shadowing, that an inexperienced individual attempting shadowing for the first few times will experience fatigue and difficulty within a short period of time.

guage to the second language.[318] This is how bilingual individuals learn how to simultaneously interpret.[319]

V. CONCLUSION

The face of the law has changed in the past thirty years.[320] Alternative Dispute Resolution, which was previously the wave of the future, is now here to stay.[321] Individuals involved in the law have adapted to the changes and created specialized fields and practices focused on ADR.[322] Mediation is the mainstay of ADR, and is now mandatory either by statute, court rule, or judge in a vast majority of cases.[323] In order to have a successful mediation in one language,[324] all that is needed is a third-party neutral that can facilitate communication between the parties to achieve a voluntary mutually agreeable settlement.[325] She must go through a short training course[326] and adhere to certain ethical rules set out by the corresponding jurisdiction to become a mediator.[327]

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318. *Id.*

319. *Id.*

320. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (West 2005) (noting the statutory recognition of the Texas policy preferring alternate resolution procedures); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 170 (2003) (tracing the history of mediation as one beginning modestly, but now is an established and complicated area of the law).

321. *See* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 165–67 (2003) (noting the rise in the implementation and popularity of dispute resolution in the last several decades and policies that have made it a permanent judicial remedy).

322. *See id.* at 165–66 (referring to growing interest in the legal community for alternatives such as negotiation and mediation).

323. *See* 1 SARAH R. COLE ET AL., MEDIATION: LAW, POLICY & PRACTICE § 7:1 & n.1 (2d ed. 2010) (reviewing the various places and ways mediation might be required by a party).

324. *But see* Daniel Q. Posin, *Mediating International Business Disputes*, 9 FORDHAM J. CORP. & FIN. L. 449, 471 (2004) (making the case that mediation between parties that speak the same language does not necessarily preclude the possibility of breakdowns in the process).

325. *See* TEX. CIV. PRAC. & REM. CODE ANN.§ 154.023(a) (West 2005) (defining mediation).

326. *Id.* § 154.052(a).

327. *See* Suzanne McCorkle, *The Murky World of Mediation Ethics: Neutrality, Impartiality, and Conflict of Interest in State Codes of Conduct*, 23 CONFLICT RESOL. Q. 165, 165–71 (2005) (discussing fundamental issues of ethics in the context of the codes of conduct used throughout the several states).

The United States is not monolingual; in fact, its citizens truly are and have long been a melting pot of different cultures and languages.[328] Attorneys and ADR practitioners are no exception. They speak other languages as well, and market that skill to potential clients in an effort to maximize their earning potential.[329]

Unfortunately, many bilingual attorney-mediators have taken it upon themselves to complete two distinct professions done by two distinct persons, and combined them into one person with dual roles. They do not realize that being bilingual does not mean a person is qualified to change a spoken message from the non-English language to English and vice-versa.[330] Ideally, this is where an interpreter comes in, a master of various languages and cultures, an expert in the art and science of interpretation.[331] The federal and state legal systems have provided a statutory right to an interpreter during judicial proceedings,[332] but the same is not always true for ADR.[333]

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328. *See* Tamar Brandes, *Rethinking Equality: National Identity and Language Rights in the United States*, 15 TEX. HISP. J. L. & POL'Y 7, 9 (2009) (noting that "language-related controversies" were generally *de minimis* prior to the 1980s).

329. *See* Joseph P. McMahon, *Moving Mediation Back Towards Its Historic Roots—Suggested Changes*, 37-JUN. COLO. LAW. 23, 24–26 (2008) (describing the evolution of mediation into a marketed commodity where mediators offering additional services and expect additional compensation).

330. *See* ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 63–66 (1992); Cassandra L. McKeown & Michael G. Miller, *Say What?: South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. REV. 33, 40 (2009) (explaining certified federal court interpreters must exhibit college level proficiency in both English and Spanish languages on their written certification exams).

331. *See, e.g.*, ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 53–54 (1992) (reviewing only some of the many complexities involved in interpreting as cross-cultural interaction, and thereby interactions among individuals speaking different languages increases due to technology and other modern advancements); Cassandra L. McKeown & Michael G. Miller, *Say What?: South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. REV. 33, 40 (2009) (describing some of the characteristics any interpreter should have, including the most important—to be able to convey the intent of the words of the speaker, rather than mechanically translating their words regardless of intent).

332. *See* 28 U.S.C. § 1827(a) (2006) (mandating the Director of the Administrative Office of the United States Court "establish a program to facilitate the use of certified and otherwise qualified interpreters in judicial proceedings instituted by the United States"); *see also id.* § 1827(j) (defining "judicial proceedings" as used in § 1827(a) to include both civil parties and criminal defendants).

333. *See, e.g.*, 28 U.S.C. §§ 1827(d),(g) (2006); ARIZ. REV. STAT. ANN. § 12-242 (2003); ARK. CODE ANN. § 16-64-111 (2005); CAL. EVID. CODE § 754 (Deering 2009); ORE. REV. STAT. § 45.275(a) (2009); TEX. GOV'T CODE ANN. § 57.002(a) (West 2005).

Elena M. de Jongh, a certified court interpreter and professor of interpretation, eloquently summarizes the complexities of interpretation as such:

> Interpretation requires a deep familiarity with the languages involved (bilingualism) and their respective cultures (biculturalism). In court interpreting, biculturalism plays a significant role in preserving the rights of non-English speakers who come into contact with our judicial system, because to interpret speech is to transpose it with its entire semantic, emotional and aesthetic baggage into a language using different modes of expression. To interpret, one must initially comprehend the message perfectly. Such comprehension enables the interpreter to detach the message from its verbal support and subsequently reconstitute it with all its nuances in another language. Interpretation, then, is "a constant exchange and interchange of mentalities, of one cultural universe with another."[334]

This is something most bilinguals alone are not able to provide.[335] An interpreter is a bilingual, but a bilingual is not an interpreter.[336] Many individuals, including judges and lawyers, are still under the belief that a bilingual individual would be a competent interpreter.[337] Ad-hoc interpreters are simply unacceptable.[338] This includes friends, family, children,[339] co-defendants, court employees, or any other person who may happen to know the foreign language and English.[340] Ultimately, this

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334. ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 59–60 (1992).

335. *See id.* at 64 (stating that while bilingual individuals are abundant, bilingual individuals who meet the minimum skill levels required to be an interpreter are rare).

336. *See id.* at 63–64 (reiterating that while being bilingual is necessary to being an interpreter, standing alone, bilingualism is insufficient to qualify the individual as an interpreter).

337. Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 13 (1997).

338. *See id.* at 19–23 (discussing who should be retained as interpreters, and eliminating ad-hoc interpreters); *see also* People v. Gonzales, 554 N.E.2d 1269, 1270–71 (N.Y. 1990) (holding that an inculpatory statement made to a local Spanish teacher, an ad-hoc interpreter acting as an agent of the court, did not violate the defendant's right to counsel); R & D Sod Farms, Inc. v. Vestal, 432 So.2d 622 (Fla. Dist. Ct. App. 1983) (holding the plaintiff's brother, who acted as an ad-hoc interpreter, was not qualified or sworn as an interpreter as required by statute therefore disqualifying his testimony).

339. *See* Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1028–29 (2007) (making the case that individuals who do not speak English living in the United States often rely, to their detriment, on their bilingual children to interpret for them).

340. *See* Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 19–22 (1997) (laying out the problem of using ad-hoc interpreters); *see also* SUSAN BERK-SELIGSON, THE BILINGUAL

unacceptability expressly includes bilingual mediators engaging in the dual-roles of mediating and interpreting.[341]

Mediation sessions with non-English speaking parties must have a certified court interpreter just like any other legal proceeding.[342] The interpreter offers superior language skills,[343] as well as impartiality and confidentiality, the product of professional ethical codes and standards of professional conduct.[344] At first glance these ethical standards seem similar to the ones a mediator must adhere to, although upon further analysis, are very different.[345]

The solution to the problem is simple: two roles, two people; one mediator, and one court interpreter.[346] A model statutory guideline that can be followed by any jurisdiction to clarify and prohibit the dual-role bilingual mediator can be found in Rule 3.857(d) of the California Rules of Court, which sets out the quality of the mediation regarding representa-

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COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS 26 (1st ed. 1990) (explaining that "linguistically homogenous areas" often lack individuals competent to interpret).

341. Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 23 (1997).

342. *See id.* at 51.

343. Bruno G. Romero, *Here Are Your Right Hands: Exploring Interpreter Qualifications*, 34 U. DAYTON L. REV. 15, 28–29 (2008) (detailing the Administrative Office of U.S. Courts' oral and written examination process; successful participants receive a federal court interpreter certification). "Certification programs affirm that interpreters who pass the exams possess the minimum acceptable level of skill to function effectively as a court interpreter." *Id.*

344. 16 TEX. ADMIN. CODE § 80.100 (2009) (Tex. Dep't of Licensing & Reg., Code of Ethics and Professional Responsibility) (outlining the licensed court interpreters' code of ethics and professional responsibility).

> Many persons who come before the courts are non- or limited-English speakers. The function of court interpreters and translators is to remove the language barrier to the extent possible, so that such persons' access to justice is the same as that of similarly situated English speakers whom no such barrier exists. The degree of trust that is placed in court interpreters and the magnitude of their responsibility necessitate high, uniform ethical standards that will both guide and protect court interpreters in the course of their duties as well as uphold the standards of the profession as a whole. Interpreters are highly skilled professionals who fulfill an essential role in the administration of justice.

Id. § 80.100(a).

345. *Compare* 16 TEX. ADMIN. CODE § 80.100 (2009) (Tex. Dep't of Licensing & Reg., Code of Ethics and Professional Responsibility) (providing Licensed Court Interpreters' code of ethics), *with* CAL. RULES OF COURT, rule 3.850(a) (West 2009) (outlining the standards of conduct for Mediators).

346. *See* Lela P. Love & Joseph B. Stulberg, Partnerships and Facilitation: *Mediators Develop New Skills for Complex Cases*, DISP. RESOL. MAG., Spring 2003, at 14, 14–15 (suggesting a partnership approach to complex mediation cases by employing a skilled interpreter, co-mediators, and additional resource experts).

tion and other professional services.[347] The rule states: "A mediator must inform all participants, . . . that during the mediation he or she will not represent any participant as a lawyer *or perform professional services in any capacity other than as an impartial mediator.*"[348] Interpretation is a professional service and a dual-role bilingual mediator should, therefore, be prohibited by statute from doing both roles.[349]

It is a well-documented fact that there is a shortage of certified interpreters,[350] but this is no excuse when the stakes of court-ordered mediation are similar to high-risk civil proceedings. Other alternatives may exist that can be attempted and studied.[351] The use of co-mediators has been proposed with different variations.[352] This, in turn, would allow the mediators to work in teams, much like conference interpreters, reducing fatigue and allowing them to recover cognitively. They can take turns facilitating and interpreting, or can at least lighten the workload between one another.

When a bilingual attorney–mediator attempts to accomplish dual-roles, he jeopardizes every aspect of the proceeding.[353] As a bilingual attempting to be an interpreter, he is completely unfamiliar with the complexity of the languages and their cultures, as well as the inner workings, methods, and techniques of interpretation.[354] He also does not understand the

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347. CAL. RULES OF COURT, rule 3.857(d) (Deering 2007).

348. *Id.* (emphasis added).

349. *See* CAL. RULES OF COURT, rule 3.857(d) (Deering 2007).

350. MARIANNE MASON, COURTROOM INTERPRETING 6–7 (2008) (documenting the low number of candidates who pass the Federal Court Interpreters Examination).

351. *See* Robert F. Blomquist, *Some (Mostly) Theoretical and (Very Brief) Pragmatic Observations on Environmental Alternative Dispute Resolution in America*, 34 VAL. U. L. REV. 343, 359–60 (2000) (advocating for the use of Environmental ADR and a study of interpreter techniques).

352. *See e.g.*, Alexandra Alvarado Bowen, *The Power of Mediation to Resolve International Commercial Disputes and Repair Business Relations*, 60-JUL DISP. RESOL. J. 59, 61 (2005) (proposing one mediator fluent in English, the other in Spanish); Josefina M. Rendón, *Under the Justice Radar?: Prejudice in Mediation and Settlement Negotiations*, 30 T. MARSHALL L. REV. 347, 370 (2005) (recommending co-mediators in mediations involving parties from different races or nationalities); Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 23 (arguing against bilingual mediators acting as interpreters in their own mediation sessions and advocating for co-mediation with an additional bilingual mediator fulfilling the role of interpreter).

353. *See* Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 23 (detailing ways in which mediation can be jeopardized by a mediator acting as an interpreter, most importantly, the loss of perceived neutrality).

354. *See* Daniel Q. Posin, *Mediating International Business Disputes*, 9 FORDHAM J. CORP. & FIN. L. 449, 471 (2004) (emphasizing the essential need to hire an excellent interpreter in order to avoid catastrophic misunderstandings during the mediation process).

full effects of interpreter fatigue.[355] The added cognitive requirement of interpreting, along with the interpreter fatigue, would in turn affect the quality of his mediation skills.[356] The opposite is also true. If he focuses solely on achieving a mutually agreeable settlement, the parties will never be able to successfully communicate, therefore preventing that very settlement from ever taking place.

The analysis of the hypothetical problem illustrated the impossible confidentiality requirements of a dual-role, a result of a complex overlapping of the following individual roles: attorney, mediator, and interpreter. Each individual role has its own rules and standards for confidentiality, some which encompass each other, others that stand in isolation when the rest have fallen. The neutrality issues related to the dual-role are not as complex, but still raise questions regarding impartiality. In interpreting, a bilingual inexperienced in interpretation is likely to be perceived as biased due to inappropriate communication with the parties on a personal level. Alternatively, the inexperienced bilingual interpreter's commentary on the case can be misconstrued as favoritism towards one of the parties. Two individual professionals, fulfilling two individual roles, must be used in order to guarantee a fair, efficient, and successful mediation for the parties.

355. *See* Diana K. Cochrane, Note, *¿Como Se Dice, <Necesito a un Intérprete>? The Civil Litigant's Right to a Court-Appointed Interpreter in Texas*, 12 SCHOLAR 47, 74–75 (2009) (describing the effects of interpreter fatigue on the accuracy of interpretation and thus the quality of justice).

356. *See id.* (describing the effects of interpreter fatigue); Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 23 (noting that a mediator acting as an interpreter creates a split of concentration and negatively impacts the dispute resolution process).